CORRECTED COPY

Supreme Court, U.S.
FILED
(3) 931990 JUN 9 1994
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

OCTOBER TERM, 1993

TRANSPAC DRILLING VENTURE, 1983-63 BY CRESTWOOD HOSPITALS, INC., TRANSPAC DRILLING VENTURE, 1983-1 BY CRESTWOOD HOSPITALS, INC., TRANSPAC DRILLING VENTURE, 1983-2 BY JAMES M. DOBBINS, AND TRANSPAC DRILLING VENTURE, 1983-4 BY BRYAN D. BURR,
PETITIONERS,

v.

UNITED STATES,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Arthur H. Boelter
Counsel of Record
BOELTER & GALE
1001 Fourth Avenue #4111
Seattle, WA 98154-1121
(206) 587-0000

72pp

1. Whether 26 U.S.C. §6231(a)(7) applies in proceedings under the Tax Equity and Fiscal Responsibility Act of 1982 after the Final Partnership Administrative Adjustment has been issued to a partnership - the judicial phase of the partnership proceeding.

2. Whether a party can ratify by implication a petition filed under the partnership rules of the Tax Equity and Fiscal Responsibility Act of 1982 which petition is filed by a non-Tax Matters Partner during the initial 90 day period following issuance of the Final Partnership Administrative Adjustments.

Parties to Proceeding:

The names of all parties to this proceeding, not listed in the caption, are: Ivar and Tennie Anderson, Jeanne S. Anderson, Gila Burr, Guile Dobbins, James M. Dobbins, Jr., and Margorie Dobbins. None of these parties have any parent companies or subsidiaries which are not wholly owned.

TABLE OF CONTENTS

Questions Presented..... i

Parties to Proceeding..... iii

Table of Authorities..... vii

Opinions Below..... 2

Jurisdiction..... 2

Statutes and Regulations Involved..... 2

Statement of Case..... 4

I. JURISDICTION OF THE LOWER COURTS..... 4

II. STATEMENT OF FACTS..... 5

Reasons for Granting the Petition..... 10

Argument..... 12

I. PRELIMINARY STATEMENT.. 12

II. IRC §6231(a)(7) AND THE REGULATIONS PROMULGATED THEREUNDER SHOULD BE HELD TO APPLY ONLY DURING THE AUDIT PROCEEDINGS ALLOWING A PARTNERSHIP TO APPOINT A LIMITED PARTNER AS THE TMP FOR JUDICIAL PROCEEDINGS..... 17

A. The TEFRA Organizational Structure And The TMP's Changing Role Throughout The Various Stages Therein..... 18

1. Administrative Stage..... 18

2. Judicial Stage... 20

B. The Rights And Duties Of The TMP During The Judicial Stage Of The TEFRA Proceedings Dictate That A Partnership Should Not Be Bound By The Requirements Of IRC §6231(a)(7) For Designating A TMP After The Receipt Of An FPAA..... 24

C. Internal Revenue Service Procedural Guidelines And Rules Regarding §6231(a)(7)..... 30

D. Prior Tax Court Cases..... 35

E. Denial Of Due Process..... 45

III. EITHER ADAMS OF THE PARTNERSHIP SHOULD BE ALLOWED TO RATIFY THE PETITIONS FILED BY CRESTWOOD, DOBBINS AND BURR..... 54

IV. CONCLUSION..... 62

Appendix..... A1

TABLE OF AUTHORITIES

cases:

Chomp Associates v. Commissioner, 91 T.C. 1069 (1988)..... 23, 41
..... 42, 44

Cindy's Inc. v. U.S., 740 F.2d 851 (11th Cir. 1984)..... 50

Collins v. U.S., 532 F.2d 1344 (Cl. Ct. 1976)..... 60

Computer Programs Lambda v. Commissioner, 89 T.C. 198 (1987)..... 23, 37,
..... 38

Computer Programs Lambda v. Commissioner, 90 T.C. 1124 (1988)..... 22, 36,
..... 37, 38,
..... 39, 41,
..... 44, 52

Construction Equipment Lease Co. v. U.S., 17 Cl. Ct. 628 (1989)..... 55, 59

Continental Equities, Inc. v. Commissioner, 551 F.2d 74 (5th Cir. 1977)..... 28

De Lucia v. Commissioner, 97 T.C. 804 (1986)..... 26

Estate of Haber v. Commissioner, 91 T.C. 236 (1988) 26

Golsen v. Commissioner, 54 T.C. 742 (1970) *aff'd* 445 F.2d 985 (10th Cir. 1971) *cert. denied* 404 U.S. 940 (1971) 27

Kraasch v. Commissioner, 70 T.C. 623 (1978) 59

Mishawaka Properties Co. v. Commissioner, 100 T.C. 353 (1993) ..... 56, 57, ... 59

Montana Sapphire Associates v. Commissioner, 95 T.C. 477 (1990) 55, 59

Phillips Petroleum Co. v. Commissioner, 92 T.C. 55 (1989) 28

September Partners, Ltd. v. Commissioner, 58 T.C.M. (CCH) 1244 (1990) ..... 23, 38, ... 44

Seneca Ltd. v. Commissioner, 92 T.C. 363 (1989) *affirmed without published opinion* 899 F.2d 1255 (9th Cir. 1990) ..... 32, 33, ... 34, 45, ... 46

Sherman v. U.S., 356 U.S. 369 (1958) 16

Stahmann v. Vidal, 305 U.S. 61 (1938) 60

Taylor v. Commissioner, 258 F.2d 89 (2d Cir. 1985)... 28

statutes and regulation:

Internal Revenue Code (26 U.S.C.):

§6031(a)..... 12

§6221..... 12

§6224(a)..... 18, 25

§6224(c)..... 25

§6224(c)(3)..... 19

§6226..... 13, 20, ... 26, 51

§6226(a)..... 13

§6226(b)(1)..... 13

§6226(b)(2)..... 14

§6226(b)(5)..... 21, 29

§6226(e)..... 60

§6226(e)(1)..... 61

§6226(g)..... 29

§6231..... 23

§6231(a)(1)..... 12

§6231(a)(7)..... *passum*

§6402..... 60, 61

§6511..... 60, 61

§7422(h) 47, 49

Tax Equity and Fiscal Responsibility Act of 1982,

26 U.S.C. §6221 *et. seq.* 12, 17
..... 18

DEL. CODE ANN. tit. 6 §1521 (1993) 16

Temp. Reg. §301.6223(b)-1T(a) 24

Temp. Reg. §301.6223(c)-1T(c) 25

Temp. Reg. §301.6223(g)-1T 38

Temp. Reg. §301.6224(a)-1T 18, 25

Temp. Reg. §301.6231(a)(7)-1T 22

Temp. Reg. §301.6231(a)(7)-1T(f) 34

Temp. Reg. §301.6231(a)(7)-1T(f)(1)(i) 15

Temp. Reg. §301.6231(a)(7)-1T(f)(1)(iii) 16

Temp. Reg. §301.6231(a)(7)-1T(k) 42, 43,
..... 48

Temp. Reg. §301.6231(a)(7)-1T(l)(3) 15

Temp. Reg. §301.6231(a)(7)-1T(l)(4) 15

miscellaneous:

Burnett & Kafka, *Litigation of Federal Tax Controversies* (1991)..... 26

CT. FED. CL. R. 15(a)..... 55

CT. FED. CL. R. 17(a)..... 55, 56

IRM 8113(630), Appeals TEFRA Handbook..... 19

Rev. Proc. 88-16, 1988-1 C.B. 691..... 30, 31,
..... 33, 34

§2.03..... 31

Saltzman, *IRS Practice & Procedure* (2d Ed. 1991).... 26, 28

Tax Court Rule 74(a)..... 26

Tax Court Rule 75..... 26

Tax Court Rule 80..... 26

Tax Court Rule 81..... 26

Tax Court Rule 248..... 29

Tax Court Rule 248(a)..... 22

Tax Court Rule 250..... 15, 23

In the Supreme Court of the United States

OCTOBER TERM, 1993

No.

TRANSPAC DRILLING VENTURE, 1983-63 BY CRESTWOOD HOSPITALS, INC., TRANSPAC DRILLING VENTURE, 1983-1 BY CRESTWOOD HOSPITALS, INC., TRANSPAC DRILLING VENTURE, 1983-2 BY JAMES M. DOBBINS, AND TRANSPAC DRILLING VENTURE, 1983-4 BY BRYAN D. BURR,

PETITIONERS,

v.

UNITED STATES,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Petitioners respectfully pray for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Federal Circuit entered in this matter on February 8, 1994.

OPINIONS BELOW

The opinion of the Court of Appeals for the Federal Circuit (No. 93-5045) (App., *infra*, A1-A31) is reported at 16 F.3d 383. The opinion of the United States Claims Court[1] (90-116T, 90-123T, 90-124T and 90-130T) (App., *infra*, A32-A52) is reported at 26 Cl.Ct. 1245.

JURISDICTION

The judgment of the Court of Appeals for the Federal Circuit was entered on February 8, 1994. This petition was timely filed in accordance with SUP. CT. R. 13 and is authorized by 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

26 U.S.C. 6231:

---

[1] The United States Claims Court is now known as the United States Court of Federal Claims.

(a) DEFINITIONS.--For purposes of this subchapter--

(7) TAX MATTERS PARTNER--The tax matters

partner of any partnership is--

(A) the general partner designated as the tax matters partner as provided in the regulations, or

(B) if there is not general partner who has been so designated, the general partner having the largest profits interest in the partnership at the close of the taxable year involved (or, where there is more than 1 such partner, the 1 partner of such partners whose name would appear first in an alphabetical listing).

If there is no general partner designated under subparagraph (A) and the Secretary

determines that it is impracticable to apply subparagraph (B), the partner selected by the Secretary shall be treated as the tax matters partner.

The texts of the following statutes and regulations relevant to the determination of the present case are set forth in the Appendix at A53-A77: Tax Equity and Fiscal Responsibility Act of 1982, 26 U.S.C. §§6221-6231; Temp. Reg. §301.6224(a)-1T; Temp. Reg. §301.6231(a)(7)-1T.

STATEMENT OF THE CASE

I. JURISDICTION OF THE LOWER COURTS.

In response to a Notice of Final Partnership Administrative Adjustment ("FPAA") issued by the Commissioner of Internal Revenue, each Petitioner filed a timely petition for readjustment as Tax Matters Partner ("TMP") of their respective partnerships in accordance

with 26 U.S.C. §6226 ("code" or "IRC") as authorized by 28 U.S.C. §1508. Petitioners timely appealed from the judgment of the Court of Federal Claims under 28 U.S.C. §1295(a)(3) as authorized by IRC §6226(g) and (h).

II. STATEMENT OF FACTS

Transpac Drilling Venture 1983-1, 1983-2, 1983-4 and 1983-63 (hereinafter TDV 1983-1, TDV 1983-2, TDV 1983-4 AND TDV 1983-63) are limited partnerships organized under the laws of Delaware. They were formed as part of the Transpac Drilling Venture Program. (App. *infra* at A5-A6).

The partnerships were formed with two general partners, Douglas C. Adams ("Adams") and Churchill Oil and Gas Corporation ("Churchill"). Adams became the TMP of TDV 1983-1, 1983-2, 1983-4 and 1983-63 at some time prior to and continued to be such until his January

30, 1990 resignation, unless his designation as TMP was terminated for some other reason. (App., *infra* at A5). On or about September 4, 1987, Adams agreed to plead guilty to charges of conspiracy and aiding and abetting fraud by an investment counselor arising from his actions in connection with the Transpac Drilling Venture Program. As part of his agreement, Adams was required to file amended income tax returns for 1983 and 1984 removing all items attributable to Transpac. (App., *infra* at A6-A7). Churchill, a Texas corporation, forfeited its corporate charter in 1984. (App. *infra* at A5-A6).

Crestwood Hospitals, Inc. ("Crestwood"), Bryan Burr ("Burr") and James M. Dobbins ("Dobbins") were limited partners in one or more of TDV 1983-1, 1983-2, 1983-4 and TDV 1983-63 during the taxable years 1983 and 1984. (App. *infra*

at A7).

The Internal Revenue Service ("IRS") conducted a partnership level examination of TDV 1983-1, 1983-2, 1983-4 and 1983-63's partnership returns of income (Form 1065) filed for taxable years 1983 and 1984. At the conclusion of the examination, the IRS issued a FPAA to each of the partnerships. The FPAA was mailed to Adams as TMP of TDV 1983-63 on November 7, 1989, for TDV 1983-1 and TDV 1983-2 on November 9, 1989, and for TDV 1983-4 on November 17, 1989. Copies of the FPAAs were subsequently sent to the limited partners in the partnerships including Crestwood, Burr and Dobbins. (App. *infra* at A7, A34-A35). Petitions for readjustment were filed in the U.S. Claims Court by Crestwood, Burr and Dobbins ("Petitioners") within the 90 days following the mailing of the FPAAs to Adams as TMP. Concurrent with the

filing, Petitioners made the required deposit with the IRS for the taxable years 1983 and 1984 for their respective partnerships. (App. *infra* at A11-A12, A37).

On February 12, 1990, Adams signed several documents each entitled "Resignation of Tax Matters Partner and Appointment of New Tax Matters Partner." Those documents state that Adams was resigning as TMP for each of the partnerships and appointed each of the Petitioners as TMP for the respective partnerships. The documents stated that Petitioners agreed to become general partners of the partnerships for the limited purpose of becoming the TMP. These documents were signed by Petitioners on April 9, 1990. (App. *infra* at A11-A12). In addition to these documents, Petitioners attempted to contact the other limited partners in the

partnership and get their approval on the filing of the petitions. (App. *infra* at A23-25).

The Court of Federal Claims held that Petitioners were unable to be the TMPs of the partnerships because they were not general partners in their respective partnerships under IRC §6231(a)(7). (App. *infra* at A40-A47). They further held that the court did not have the power to appoint Petitioners as the TMPs finding that §6231(a)(7) applies during the judicial stage as well as the administrative stage of the proceedings under IRC §§6221-6233. (App. *infra* at A48-A49). Finally, they found that neither the partnerships nor Adams were able to ratify the petitions because Petitioners did not meet the deposit requirement of IRC §6226(e)(1). (App. *infra* at A50-A51).

The Court of Appeals for the Federal

Circuit affirmed the holding of the Court of Federal Claims finding that Petitioners were not general partners of the partnership. (App. *infra* at A18-A20). They agreed with the lower court in finding that §6231(a)(7) applied during the judicial phase of a TEFRA proceeding as well as the administrative stage. (App. *infra* at A20-A22). The court of appeals further found that there could be no post-filing ratifications of the petitions filed in this matter because the court must have jurisdiction over the case at the time the petition is filed. (App. *infra* at A23-A29). Finally, the appellate court found that Petitioners due process rights were not violated in this case. (App. *infra* at A29-A31).

REASONS FOR GRANTING THE PETITION

This is a case of first impression

where this Court must decide primarily two questions. First, whether or not IRC §6231(a)(7) and the regulations promulgated thereunder apply to the judicial stage of a TEFRA proceeding. The Tax Court has ruled that §6231(a)(7) does not apply; however, the Court of Federal Claims and the Court of Appeals for the Federal Circuit have ruled that it does apply. Second, whether or not a party can ratify by implication a petition under TEFRA which petition is filed by a non-TMP during the initial 90 day period following issuance of the FPAA. Once again, the Tax Court has ruled that implied ratification applies to TEFRA proceedings and the Court of Federal Claims and the Court of Appeals for the Federal Circuit have said that it does not apply.

ARGUMENT

I. PRELIMINARY STATEMENT.

Prior to 1982, IRS audits of partnerships and subchapter S corporations were conducted on an individual level. With the passage of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA) these audits were conducted on an entity level. The TEFRA rules, with respect to partnerships, applied to virtually all partnerships which were required to file tax returns under IRC §6031(a) whose tax years began after September 3, 1982. IRC §§6221, 6231(a)(1).

The rules under TEFRA are codified in Subchapter C of Chapter 63 of the Code at §§6221-6233. In general these sections provide for an audit to be conducted at the partnership level with special forms of notification to various partners. At

the conclusion of the audit a notice of adjustment, the FPAA, like the normal statutory notice of deficiency is sent to the partners. Thereafter, the partners may seek judicial review of the adjustments determined by the IRS.

The main problem in this case results from the interplay between IRC §§6226 and 6231(a)(7). Once the FPAA is mailed to the TMP, IRC §6226 governs judicial reviews of the proposed adjustments. It states a system of priorities in terms of the various forums and the time and manner of access to those forums. Under IRC §6226(a) only the TMP may file a petition within the first 90 days after the FPAA is issued. Once this time expires, certain other partners may file a petition within the next 60 days. IRC §6226(b)(1). During this 60 day period, however, any petition filed in the Tax Court has priority over all other

petitions and those other petitions must be dismissed. IRC §6226(b)(2). The effect of this is that if a partner with a 70 percent interest files in the Court of Federal Claims on the 91st day and a partner with a 1 percent interest files in the Tax Court on the 149th day, the petition in the Court of Federal Claims must be dismissed. As such, a partner with little interest in the partnership or the proceeding can control the litigation.

Because of this, the determination of the partnership's TMP is of vital importance. IRC §6231(a)(7) defines a TMP. There are statutory limitations found in IRC §6231(a)(7) requiring the TMP to be a general partner in the partnership or if no general partner is designated or otherwise qualified then the Secretary may choose from among the limited partners. The issue is whether

the application of this provision and the regulations thereunder should be limited to the administrative phase of a TEFRA proceeding. Several Tax Court cases (*see infra*) and the Tax Court Rules (Tax Court Rule 250) have held that it should.

In the present instance it is arguable that the partnerships, TDV 1983-1, 1983-2, 1983-4 and 1983-63 were, at the time the FPAAs were issued without a general partner. In the proceedings below the Petitioner argued that the corporate general partner (Churchill) was ineligible as its corporate charter had been revoked, *see* Temp. Regs. §§301.6231(a)(7)-1T(f)(1)(i) and -1T(l)(3), and that the individual general partner (Adams) was also ineligible on the grounds that he was under criminal investigation in 1986 and therefore disqualified under Temp. Regs. §§301.6231(a)(7)-1T(l)(4) and -

1T(f)(1)(iii), or he was disqualified under organic partnership law of Delaware (DEL. CODE ANN. tit. 6 §1521) in that both his actions in the organization of the partnerships and his cooperation as a government witness would have violated his fiduciary duty to the partnerships. *Cf. Sherman v. U.S.*, 356 U.S. 369 (1958).

For purposes of this petition and the arguments herein whether Adams or even Churchill were disqualified is irrelevant. If IRC §6231(a)(7) applies after the FPAA is issued in the TEFRA proceeding (the judicial stage) then even assuming arguendo Petitioners here were general partners the petitions should be dismissed for lack of jurisdiction under IRC §6231(a)(7) and the regulations thereunder. This is so of course because Adams designation of the Petitioners was not in accordance with the statute and regulations. Furthermore, under the

logic of the courts below even if Adams had designated Churchill (and Churchill were still a valid corporation) the petitions to the Court of Federal Claims would have been invalid.

II. IRC §6231(a)(7) AND THE REGULATIONS PROMULGATED THEREUNDER SHOULD BE HELD TO APPLY ONLY DURING THE AUDIT PROCEEDINGS ALLOWING A PARTNERSHIP TO APPOINT A LIMITED PARTNER AS THE TMP FOR JUDICIAL PROCEEDINGS.

A review of IRC §§6221-6233 clearly reveals that a TEFRA proceeding has two distinct stages, an administrative stage followed by a judicial stage. The rights and responsibilities of a TMP as to the other partners in the partnership varies greatly between the two stages.

A. The TEFRA Organizational Structure And The TMP's Changing Role Throughout The Various Stages Therein.

1. Administrative Stage

The administrative stage is broken down in the following steps: 1) issuance of the Notice of Beginning of Administrative Proceedings by the IRS ("NBAP"); 2) an audit conducted by the IRS Revenue Agent; 3) the sixty (60) day letter issued at the conclusion of the audit; 4) a conference with IRS Appeals; 5) administrative settlement (if any); and 6) the issuance of the FPAA. IRC §§6221-6233. During most of this stage, it is generally the TMP who has had primary, if not exclusive, contact with the IRS; however, every partner has the right to participate in any phase of these proceedings. IRC §6224(a); Temp. Reg. §301.6224(a)-1T. Due to this ability to participate, the partners need

not abrogate their rights to the TMP.

Although the partners participation may be limited prior to the issuance of the sixty (60) day letter, at the Appeals Conference, these partners can obtain an opportunity to engage in substantive negotiations with the IRS. The Appeals Division will grant separate conferences (in different cities if need be) for all partners who wish a conference. IRM 8113(630), Appeals TEFRA Handbook. Under §6224(c)(3), a TMP can bind only non-notice partners in most partnerships to an administrative settlement. Accordingly, the TMP's authority to bind the partnership to settlement at the administrative level is extremely limited. Therefore, the partners can largely control their own destiny as it relates to any proposed adjustments during the administrative stage of the TEFRA proceeding.

Once an FPAA is mailed the administrative stage of the TEFRA proceeding ends and the judicial phase begins since in order to avoid having the proposed adjustments become final, one of the partners must begin an action in court.

2. Judicial Stage.

Section 6226 governs judicial review of the proposed adjustments set forth in the FPAA. As discussed previously, section 6226 sets up a priority scheme for the filing of petitions based on the FPAA. Given this priority scheme the role of the TMP assumes central importance. The TMP controls the choice of forum for the first ninety (90) days after the FPAA has been mailed to the TMP. If the TMP fails to file within this time period, adverse consequences may befall the partnership. For

instance, one notice partner, possibly even a one percent, incompetent and indifferent notice partner could force litigation in the Tax Court, even if all, or a large percentage of the notice partners desired to file in another forum. Accordingly, to ensure that the partnership is able to file in the forum which will best serve the partnership, it is necessary that the partnership have a designated TMP who best understands and represents the partnership's interest.

The importance of the TMP during the judicial stage is further shown by the fact that the TMP may intervene in the judicial action started by another partner during the sixty (60) days following the initial ninety (90) day period reserved for the TMP to file. IRC §6226(b)(5). This intervention allows the TMP to participate in the litigation.

The TMP's role during the judicial

stage is further magnified in the Tax Court because the rules of the Tax Court give the TMP greater rights and responsibilities than those given statutorily. Tax Court Rule 248(a) authorizes the TMP to settle for all the partners by executing a settlement agreement which certifies that no party objects to entry of the decision. As Rule 248(a) allows the TMP to bind all notice partners and five percent (5%) groups, the TMP's authority during the judicial stage is much greater than in the administrative stage.

The importance of the TMP and the nonapplicability of §6231(a)(7) and Temp. Reg. §301.6231(a)(7)-1T during the judicial stage can be seen by the Tax Court's ruling in *Computer Programs Lambda v. Commissioner*, 90 T.C. 1124 (1988)("*Computer Programs II*"), where the court using its inherent powers appointed

a limited partner to be the TMP of the partnership since no general partner could act as the TMP. *See also Computer Programs Lambda v. Commissioner*, 89 T.C. 198 (1987)("*Computer Programs I*") and *September Partners, Ltd. v. Commissioner*, 58 T.C.M. (CCH) 1244 (1990)(In each of these cases the court asked the limited partners to select a TMP for the partnership). This right is codified in Tax Court Rule 250. Nowhere in the statute is the Tax Court or any court given this power. Such a power can exist only if §6231(a)(7) and the regulations promulgated thereunder, do not apply during the judicial stage. This position is supported in *Chomp Associates v. Commissioner*, 91 T.C. 1069 (1988) where the court held that the "obvious purpose" of the Secretary's regulations under §6231 is to give the IRS "the name and an address of the TMP to be able to properly

mail a FPAA." *Chomp Associates, supra* at 1078.

B. The Rights And Duties Of The TMP During The Judicial Stage Of The TEFRA Proceedings Dictate That A Partnership Should Not Be Bound By The Requirements Of IRC §6231(a)(7) For Designating A TMP After The Receipt Of An FPAA.

As shown above the rights and responsibilities of the TMP to the other partners varies significantly depending on the stage of the TEFRA proceedings. During the administrative stage the partnership is dealing solely with the IRS. During this time, the IRS uses the TMP as a contact for the partnership, as well as an informant. During this stage, any partner has the right to participate to the same extent as the TMP in the following ways: first) any partner or five percent (5%) group can receive any notice the IRS mails to the TMP, Temp. Reg. §301.6223(b)-1T(a); second) any

partner may furnish information to the IRS, *Id.*; third) any partner may participate in any phase of the administrative proceeding, including attending any meeting between the IRS and the TMP, IRC §6224(a); Temp. Reg. 301.6224(a)-1T; and most importantly, fourth) any partner may file an administrative appeal and obtain a settlement with the IRS prior to the judicial phase. *See* IRC §6224(c). In addition, during the administrative phase, the TMP has only a very limited right to enter into an administrative settlement that is binding on the other partners. Temp. Reg. §301.6223(c)-1T(c).

Once the judicial phase begins, at the mailing of the FPAA, the TMP assumes a more critical role and has rights and responsibilities which are not available to the other partners. For example, the TMP has the exclusive right to determine

the forum in which the partnership will litigate the Government's position as set forth in the FPAA. IRC §6226. This right is no small matter. There are decided differences in the three courts available under §6226. Of these three, the Tax Court is the least favorable for this type of litigation. For this reason, it is understandable that the IRS insists that this matter be heard in the Tax Court.

The discovery rules in the Tax Court are the most restrictive. They do not allow depositions of parties or witnesses except in rare instances.[2] These

---

[2] *See* Tax Court Rules 74(a), 75, 80 and 81. *See also* Saltzman, *IRS Practice & Procedure*, 9-31, 9-32 (2d Ed. 1991); Burnett & Kafka, *Litigation of Federal Tax Controversies*, Chapter 1 and Chapter 7 (1991). *See also De Lucia v. Commissioner*, 87 T.C. 804 (1986) and *Estate of Haber v. Commissioner*, 91 T.C. 236 (1988). Both Saltzman and Kafka, in their respect works, list a number of differences in the respective forums some of which do not pertain to this litigation. Among those of some

depositions are essential to the success of the taxpayers in cases, such as this one, wherein the promoter and general partners are unfriendly and have interests adverse to those of the Petitioners and are in possession of the facts of the case. In this case, the Government investigated the facts over several years and criminally prosecuted the promoters and general partners in these partnerships. They know the facts and have seen the documents. The promoters and the various general partners have seen the documents and they are in possession of the facts. The Petitioners have not seen the documents

---

importance are: 1) increased deficiency (In the Tax Court, as opposed to the other forums, the Commissioner may seek an increased deficiency); and 2) precedent (By filing in the Tax Court where a particular partner resides the entire partnership may be prey under the *Golsen* rule to an unfavorable result). *See Golsen v. Commissioner*, 54 T.C. 742 (1970) *aff'd* 445 F.2d 985 (10th Cir. 1971) *cert. denied* 404 U.S. 940 (1971).

and have not interviewed the witnesses. In the Tax Court, they will not get this opportunity until the trial itself.

Besides the discovery differences, the types of trials are different in the various forums. In both the Tax Court and the Court of Federal Claims, the trial is before a judge. In the district court, on the other hand, a jury trial may be had.

A third difference is that both the district court and the Court of Federal Claims have equitable powers, whereas the Tax Court ostensibly has none.[3] Thus, the power to provide an equitable result or reform a contract (powers which could be important in a case such as this one)

---

[3] Saltzman, *supra* at 9-31 ("The Tax Court does not recognize an equitable nature because it technically does not have equity jurisdiction.") *See also Continental Equities, Inc. v. Commissioner*, 551 F.2d 74 (5th Cir. 1977); *Taylor v. Commissioner*, 258 F.2d 89 (2d Cir. 1985); *Phillips Petroleum Co. v. Commissioner*, 92 T.C. 55 (1989).

would not be available in the Tax Court.

A second right of the TMP is that even if another partner designates the partnership's forum as the petitioning party, the TMP has the right to intervene in the action and assume the rights and responsibilities given to the TMP per the court's jurisdiction. IRC §6226(b)(5).

A third right granted to the TMP is that if the litigation is before the Tax Court, the TMP is given duties and responsibilities which extend far beyond those given under TEFRA, including a broad settlement authority. Tax Court Rule 248.

Lastly, only the TMP, notice partners and five percent (5%) groups can seek review of a court determination. IRC §6226(g). Therefore, during the judicial phase, the TMP has rights and duties not available to the other partners, and therefore, has greater and often deciding

control over the other partners' fate with respect to the proposed adjustments set forth in the FPAA.

C. Internal Revenue Service Procedural Guidelines And Rules Regarding §6231(a)(7).

Code §6231(a)(7) merely describes how a TMP is chosen not when. It is not expressly limited to the administrative stage of a proceeding but clearly it is not expressly stated to include the judicial stage. If anything the language of the statute, the regulations, the IRS' own rulings and the cases make it clear that from a legal and practical point of view §6231(a)(7) should not apply during the judicial stage of a TEFRA proceeding.

IRS procedural guidelines and rules dealing with IRC §6231(a)(7) indicate that it is only applicable during the administrative stage of a TEFRA proceeding. Revenue Procedure 88-16,

1988-2 C.B. 691, describes both the circumstances under which the IRS will select a TMP for a partnership pursuant to §6231(a)(7) and the criteria the Service will consider in its selection. Rev. Proc. 88-16 provides as follows:

> . . . under the unified proceedings, the TMP is the general partner designated by the partnership to represent the partnership before the Service in all tax matters for a specific taxable year.

Rev. Proc. 88-16 at §2.03 (emphasis added).

This language in Rev. Proc. 88-16 indicates that the TMP created by §6231(a)(7) is to be a liaison between the IRS and the partnership. As set forth in Section "II.A.1." above, the administrative stage of a TEFRA proceeding occurs between the time the NBAP is issued and the FPAA is issued. Once the FPAA is issued, the partnership is no longer under audit by the Service

for the years designated in the FPAA. Therefore, as the purpose of §6231(a)(7) is to set forth the criteria for the selection of a TMP when the partnership is before the Service, §6231(a)(7) should not be applicable subsequent to the issuance of the FPAA.

That the role of the TMP created by §6231(a)(7) is to represent the partnership before the IRS has also been expressed by the Tax Court. *See Seneca Ltd. v. Commissioner*, 92 T.C. 363 (1989) *aff'd without published opinion* 899 F.2d (9th Cir. 1990). In discussing the power that Congress granted to the Service to appoint a TMP via §6231(a)(7), the Tax Court held:

> Respondent (The Service) . . . has a public duty to assure the fairness of the partnership's administrative proceedings. The power to appoint a TMP is given to respondent in order to assist him in carrying out his administrative responsibility in partnership proceedings.

Seneca, *supra* at 367. (emphasis added). Once the Revenue Agent issues the FPAA to the partnership, the agent's administrative responsibility in the TEFRA proceeding has ended as the partnership will either seek to litigate the proposed adjustments before the jurisdiction of a court, or the partnership will do nothing, allowing assessment of the tax. Accordingly, one can infer from the opinion in *Seneca* that §6231(a)(7) is only applicable during the administrative stage of the TEFRA proceeding as the IRS agent has no administrative responsibility after such time.

Under the reasoning of Rev. Proc. 88-16 and *Seneca*, once the FPAA has been issued, the IRS agent has no need to appoint a TMP as his responsibilities at that point have been discharged and he or she is no longer in need of a liaison

between himself or herself and the partnership. If the Service therefore has no duty or incentive to appoint a TMP for a partnership once the FPAA has been issued, it is possible under the statutory scheme of §6231(a)(7) for a partnership to be unable to appoint a TMP, and thereby left without one. Pursuant to §6231(a)(7), a partnership with only limited partners will be unable to appoint a TMP itself.[4] If Congress intended §6231(a)(7) to be applicable subsequent to the time an FPAA was issued to the partnership, it is doubtful they would have left this gaping hole which leaves a partnership high and dry without a TMP.

Therefore, both Rev. Proc. 88-16 and *Seneca* give credence to the theory that

---

[4] The services own regulations may questionably allow a limited partner to be a TMP. Temp. Reg. §301.6231(a)(7)-1T(f). However, if §6231(a)(7) applies, this regulation may violate the statute.

§6231(a)(7) should no longer be applicable subsequent to the issuance of an FPAA. At that point, the Service has no use for the partnership's TMP and the TMP is solely the partnership's facilitator, who can carry out the directives of the majority of the partners. Subsequent to the issuance of the FPAA, it is clear that the TMP has no duties and responsibilities other than to the partnership, and therefore, the partnership should be able to designate the TMP of its choice, regardless of whether said TMP meets the requirements of §6231(a)(7).

D. Prior Tax Court Cases.

In several Tax Court cases, the Tax Court has demonstrated that it believes different rules apply with respect to TMP designations in the judicial stage of a TEFRA proceeding. The Tax Court has

expressly overruled §6231(a)(7) in the judicial stage of a TEFRA proceeding and has held that the temporary regulations promulgated under §6231(a)(7) have little, if any, applicability during the judicial stage.

In *Computer Program II*, the Tax Court held that it has the right to appoint a limited partner to serve as the TMP, even though such authority is not granted to it under IRC §6231(a)(7). *Computer Program II*, *supra* at 1127. In *Computer Program II*, the partnership had no general partners who were eligible to serve as the TMP, and the Service, pursuant to its statutory power under §6231(a)(7), had not selected a limited partner to act as TMP. Accordingly, as §6231(a)(7) left the partnership without a TMP, the Tax Court disregarded §6231(a)(7) and appointed a limited partner as the partnership's TMP. More

specifically, the Court directed the limited partners to make the designation among themselves, and if they failed to do so, the Court would make the designation. *See Computer Programs I, supra* at 206, n.9.

The Tax Court noted that this Court appointment was necessary in order to assure: 1) the fair, efficient and consistent disposition of partnership litigation and 2) that all partners interested in the outcome of the partnership proceeding would receive sufficient information concerning the litigation to allow them to protect their interests. *Computer Programs II, supra* at 1126 - 1127. The Tax Court elaborated on the importance of a TMP's role during the judicial stage of the TEFRA proceeding as follows:

> The presence of a tax matters partner during litigation is essential to the operation of the statutory procedures of §6221 et.

> seq., and to the fair, efficient, and consistent disposition of partnership proceedings before us. The TMP's initiative during the proceeding as well as the execution of his statutory duties will have a substantial effect upon the rights of all partners in the partnership. [*Computer Programs I*], *supra* at 206; §301.6223(g)-1T, Temp. Proc. & Admin. Reg. 52 Fed. Reg. 6785-6786 (March 5, 1987).

Computer Programs II, *supra* at 1126(emphasis added). The holding in *Computer Program II* was followed on substantially similar facts in a later Tax Court case, *September Partners, Ltd. v. Commissioner*, 58 T.C.M. (CCH) 1244 (1990).

The Government has argued and the Court of Claims agreed that *Computer Program II* is unpersuasive with respect to the taxpayers' designation of a "general partner to a limited extent" as TMP because in *Computer Program II*, a valid petition was already before the Tax Court when the Court made its designation. However, this argument

fails to glean the significance of *Computer Program II's* holding.

In *Computer Program II*, the Tax Court overrode §6231(a)(7) by allowing the partnership to appoint a limited partner as a TMP. Under the express language of §6231(a)(7), only the Service is granted the authority to appoint a limited partner as TMP. However, as the mechanisms and requirements set forth in §6231(a)(7) left the partnership in *Computer Program II* without a TMP, the Court determined it necessary to disregard §6231(a)(7) as it found that it was critical to have a TMP during the judicial stage of a TEFRA proceeding. Accordingly, contrary to the Government's argument, it is irrelevant that a valid petition was before the Court at the time the designation took place. Rather, what is relevant, is that the Tax Court overrode the express requirement of

§6231(a)(7). There is no special exception within §6231(a)(7) for a case validly petitioned to the Tax Court. It either applies or it does not. The Tax Court held it does not. The Tax Court found §6231(a)(7) inadequate as it had the capacity to leave a partnership without a TMP during the critical judicial stage of a TEFRA proceeding, and determined that therefore, §6231(a)(7) should not be applicable during the judicial stage.

As illustrated the judicial stage of the TEFRA proceeding commences when the FPAA is issued to the partnership, not when a petition is filed with the Court. Once the FPAA is issued, the partnership either accepts the adjustments set forth therein, or the partnership disagrees with the proposed adjustments and begins to formulate its litigation posture and strategy.

Accordingly, per *Computer Program II*, section 6321(a)(7) should not apply once an FPAA has been issued to the partnership as that is when the judicial stage commences and the presence of a TMP becomes a necessity. The Tax Court overrode §6231(a)(7) because it had the capacity to leave a partnership without a TMP during the judicial stage of a TEFRA proceeding. Accordingly, as litigation commences once an FPAA is issued, §6231(a)(7) should either control during the judicial stage or it should not. Whether or not a petition has been filed is irrelevant.

In another recent case, *Chomp Associates v. Commissioner*, 91 T.C. 1069 (1988), the Tax Court followed its reasoning in *Computer Program II* and held that the temporary regulations promulgated under §6231(a)(7) carry little weight, if any, in determining

whether a TMP is qualified to represent a partnership during the judicial phase of the TEFRA proceeding. In *Chomp Associates*, the Court held as follows:

> Jusidictionally, we believe that the temporary administrative regulations do not play a significant role, if any, regarding whether [a partner] had the authority to file a petition. The more obvious purpose of respondent's regulations is to provide respondent with the name and address of the TMP to be able to properly mail an FPAA.

Chomp Associates, supra at 1078. (emphasis added).

In fact, the express provisions of the §6231(a)(7) temporary regulations bolster the Tax Court's finding that the regulations were not intended to govern during the judicial stage of a TEFRA proceeding. Under Temporary Regulation §301.6231(a)(7)-1T(k), the Service states that it "is not required to give effect to (a) designation [of a TMP] . . . until thirty (30) days after the statement [so

indicating] is filed." Temp. Reg. §301.6231(a)(7)-1T(k)(emphasis added). If applied for purposes of determining jurisdiction, this provision could shorten the statutory period in which a new TMP could file a petition for redetermination. A petition and designation of a new TMP filed more than sixty (60) days after issuance of the FPAA would be subject to jurisdictional challenge at the whim of the Service, who could give effect to the designation sooner, but might not. Therefore, like statutory §6231(a)(7), the temporary regulations promulgated thereunder are defective when applied in the judicial stage of a TEFRA proceeding. The Tax Court aptly recognized the regulations' deficiencies and held they should have little, if any, applicability during the judicial stage of a TEFRA proceeding.

Accordingly, per the holdings in

Computer Program II, *September Partners* and *Chomp Associates*, the Tax Court has clearly indicated that it does not believe §6231(a)(7) and the temporary regulations promulgated thereunder should control once a partnership is in the judicial stage of a TEFRA proceeding. This Court likewise should follow Tax Court precedent. The Tax Court is either right or wrong.[5] Section 6231(a)(7) and the temporary regulations thereunder either apply or they do not during the judicial stage. This Court must decide.

---

[5] We emphasize that to fashion acute distinctions between the applicability of §6231(a)(7) when there is a valid petition vs. an invalid petition is fallacious. Section 6231(a)(7) makes no such distinction. The only distinction which can be garnered from §6231(a)(7) is that its applicability is to be limited to administrative proceedings.

E. Denial Of Due Process.

Section 6231(a)(7) and the temporary regulations thereunder have the ability to offend a taxpayer's Constitutional rights if they are applicable and controlling once an FPAA has been issued to a partnership (the judicial stage).

Per the express provisions of §6231(a)(7) and the temporary regulations adopted thereunder, if a partnership has no general partners who are eligible to serve as TMPs, the IRS, and only the IRS, has the authority to designate a limited partner as TMP. IRC §6231(a)(7). Nevertheless, this designation is not mandatory. The Tax Court has held that the appointment of a TMP by the Service pursuant to §6231(a)(7) is not mandatory provided there will be no prejudice to the rights of the partners due to the lack of a TMP. *Seneca, supra* at 367. Therefore, pursuant to §6231(a)(7), only

the Service can appoint a limited partner as TMP, and the Service need only make such appointment if a failure to do so would prejudice the rights of the partners in the partnership.

Assuming §6231(a)(7) and the regulations thereunder are applicable during the judicial stage of the TEFRA proceeding; then, if a partnership has no general partners eligible to serve as TMP at the time the FPAA is issued, the Service can either appoint a limited partner to act as TMP, or it can refuse to appoint, and leave the partnership without a TMP.[6] In either event, the partners' Constitutional rights are impaired. The Service, the partnership's adversary, is either allowed to designate its opponent's representative or worse

---

[6] As pointed out in Section II.C. herein, the Service has no responsibility or incentive to appoint a TMP once the administrative stage of a TEFRA proceeding has ended. *See Seneca, supra*.

yet, the Service is allowed to leave its opponent without a representative. To allow the Service such latitude during the judicial stage of a TEFRA proceeding offends all traditional notions of fair play and justice.

The following examples illustrate how the application of §6231(a)(7) and the regulation thereunder to the judicial phase of a TEFRA proceeding can result in a very real denial of due process:

Example No. 1

Suppose there is a partnership ABC Ltd. Partnership. A and B Co. are the general partners. C is the only limited partner. A and B Co. are ineligible to be the TMP as A was prosecuted criminally and B Co. has filed bankruptcy. C believing it must be the TMP by virtue of being the only partner left files in the Court of Federal Claims within 90 days after receiving the FPAA. The government moves to dismiss for lack of jurisdiction and the motion is granted. Under §7422(h) C may not thereafter pay the tax and litigate the merits of its case. C is thus deprived of a forum to litigate the

issues.

As a variation assume that A not wishing to participate in any further litigation calls C after the FPAA is issued and offers to designate C as TMP. C accepts and files a petition as TMP within 90 days of the FPAA. The petition so filed is subject to dismissal under the Government's interpretation of §6231(a)(7).

Example No. 2

Assume A and B Co. are the general partners and C and D are the limited partners in ABCD Ltd. Partnership. A is the TMP and has the largest profits interest. Sixty days after the FPAA is issued A designates B Co. as TMP and B Co. files the petition in the Court of Federal Claims. Under Temp. Reg. §301.6231(a)(7)-1T(k), the designation of B Co. is ineffective and the petition should be dismissed for lack of jurisdiction.

As a variation of this example assume A dies 60 days after the FPAA is issued and B Co. as the only remaining general partner files the petition within the 90 day period reserved for the TMP to file a petition. B Co. was not a general partner for the year under audit. Once again the petition could be subject to dismissal if §6231(a)(7) and the regulations are applicable.

In each of these examples the partnership would have no forum to contest the Government's increase in their tax liabilities. Code §7422(h) makes this clear. There are no exceptions for inequitable circumstances. This inability to contest a claim is the hallmark of a denial of due process. All of the partners in the above examples would be required to pay the asserted tax, penalties and interest and never be able to litigate whether the tax was in fact correct.

As previously discussed, it is critical to the partnership's fate with respect to the proposed adjustments set forth in the FPAA that the partnership have a responsible, competent and active TMP at all times during the judicial stage of the TEFRA preceding. Moreover, as pointed out earlier, during the judicial stage, the TMP has many rights

and responsibilities not available to the other partners. Therefore, during the judicial stage, it is important that the partnership's TMP be a take-charge leader who best represents the collective interests of the partners. Accordingly, during this judicial stage, the partnership should not be left without a TMP as §6231(a)(7) seemingly allows, nor should the IRS, the partnership's adversary be permitted to designate the partnership's leader as §6231(a)(7) seemingly allows.

Simply put, §6231(a)(7) and the regulations thereunder, leave the partners wide open to abuse and infringement of their Constitutional rights if they are applicable during the judicial phase. For example, the IRS could appoint shortly before or after the FPAA is issued an incompetent, indifferent, one percent limited partner

as TMP. Such an appointment could, if not would, prove detrimental to the partnership's chances at trial. Can there be any doubt as to who would be more conscientious or vigorous in the partnership litigation - a partner who has a $100 interest in the outcome or a partner who has a $500,000 interest in the outcome. Similarly, can there be any doubt as to which of these the Government would prefer as an opponent.

In the alternative, the IRS could choose to not appoint. In the case of no appointment, the partnership is denied a representative who can take advantage of the exclusive ninety (90) day filing period given to the TMP under §6226. This could, as here, deny the majority of the partners the forum of their choice. Moreover, in the case of no appointment, the partnership is left without a leader who can organize the partners and prepare

a coordinated and decisive litigation strategy.

The Tax Court recognized the inherent prejudice of the application of §6231(a)(7) in the judicial stage of the TEFRA proceeding. In *Computer Program II*, the Court held as follows:

> Where a partnership is without a TMP before this Court, we believe it is more appropriate for the Court to appoint the partnership TMP, rather than for respondent to make the appointment because respondent is the partnership's adversary during the litigation. An adversary should not appoint an opponent's representative.

Computer Program II, *supra* at 1127 - 1128.

Accordingly, §6231(a)(7) should not be applicable once an FPAA has been issued to the partnership as it has the potential to deny the partnership the right to a trial before a fair and impartial tribunal of its choice. Section 6231(a)(7) gives the Service a powerful weapon against the partnership,

its adversary, as it allows the Service to straddle the partnership with an incompetent, unmotivated or indifferent leader; to quash the partnership's ability to obtain its forum of choice and to hinder the partnership's effectiveness in organizing a cohesive and decisive litigation strategy. Therefore, as §6231(a)(7) transgresses upon the partner's Constitutional rights by denying it a full, fair and impartial hearing, a partnership should not be bound by the limitations set forth in §6231(a)(7) with respect to the selection and designation of a TMP once it has received an FPAA.

In conclusion, §6231(a)(7) and the temporary regulations thereunder should not be applicable once an FPAA has been issued to a partnership. Therefore, as the partnerships appointed petitioners as TMPs subsequent to their receipt of the

FPAAs, the Claims Court, the Court of Appeals for the Federal Circuit and the Government are in error in seeking to dismiss the taxpayers' petitions for lack of jurisdiction on the grounds that the TMPs who filed said petitions do not meet the standards set forth in §6231(a)(7).

III. EITHER ADAMS OR THE PARTNERSHIP SHOULD BE ALLOWED TO RATIFY THE PETITIONS FILED BY CRESTWOOD, DOBBINS AND BURR.

Should this Court determine that IRC §6231(a)(7) and the regulations thereunder are applicable even after the FPAA has been issued, and that pursuant thereto, Petitioners cannot qualify as the partnerships' TMPs, then Adams, the partnerships' previous TMP, should be allowed to ratify the petitions filed by Petitioners. Both the Tax Court and the

Court of Federal Claims[7] allow an imperfect petition to be cured by the filing of an amended petition provided evidence exists that the original signatory was duly authorized to file the petition on behalf of the non-signing party. *See Montana Sapphire Associates v. Commissioner*, 95 T.C. 477 (1990); CT.

---

[7] Rule 17(a) of the Court of Federal Claims states:

> No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objections for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

CT. FED. CL. R. 17(a). The rules further hold that although only certain amendments to the complaint may be had by written consent of the adverse party or by leave of the court, that such leave "shall be freely given when justice so requires." CT. FED. CL. R. 15(a); *see also Construction Equipment Lease Co. v. U.S.*, 17 Cl. Ct. 628, 630 (1989).

FED. CL. R. 17(a). The Government has argued previously that the taxpayers cannot qualify for ratification as Petitioners were not duly authorized by the partnership as the TMPs, at the time the petition was filed. The Court of Federal Claims and the Court of Appeals for the Federal Circuit accepted this argument. Nevertheless, the Tax Court very recently held that the principal of implied ratification can be applied in a TEFRA proceeding. *Mishawaka Properties Co. v. Commissioner*, 100 T.C. 353 (1993). Under *Mishawaka*, it is not necessary that a TMP be duly authorized by the partnership at the time the petition is filed, provided the petition is subsequently ratified via the conduct of either the partners who were qualified to be the TMP or by a majority of the partners who could have designated a TMP. *Mishawaka, supra* at 365. In *Mishawaka*,

as here, the petition was filed within the 90 day period following the FPAA by someone who was determined not to be the TMP. Thus, quite clearly the Tax Court had no jurisdiction to hear the case unless the petition so filed could be said to have been subsequently ratified. Notably it was the Government in *Mishawaka* who was arguing for ratification. Here the sides are reversed but the principle decided by the Tax Court remains the same and should be applied in this case.

In any event, the taxpayers herein can qualify for ratification, as the evidence indicates that there was express authorization for Petitioners' filing prior to the time of said filing, as well as express ratification thereafter. On January 30, 1989, prior to the date the petitions were filed, Crestwood, Burr and Dobbins agreed to be designated as

"general partners for the limited purpose of serving as TMP." Petitioners were duly authorized to file the petitions at the time they were filed.

Moreover, there is conclusive evidence that both Adams and the majority of the limited partners ratified Petitioners status as TMPs and the filing of the petitions subsequent to the filing thereof. On February 12, 1990, Adams executed a "Resignation of Tax Matters Partner and Appointment of New Tax Matters Partner." Subsequent to February 12, 1990, limited partners representing percentages ranging from forty percent (40%) to eighty-seven (87%) of the total interests in the partnerships signed documents consenting to Petitioners' appointments. Accordingly, subsequent conduct and written documents by Adams, as well as the limited partners, indicate that Adams and the limited partners

ratified Petitioners' appointment as TMPs and their filing of the petitions herein. Therefore, under the holdings of *Montana Sapphire* and *Mishawaka*, Adams or the partnership must be permitted to file an amended petition. *Cf. Kraasch v. Commissioner*, 70 T.C. 623 (1978)(involving implied ratification in a non-TEFRA case.)

Additionally, in the present cases, as in *Construction Equipment Lease Co.*, the Petitioners had a reasonable belief that either they were the TMPs for the partnerships or that Adams gave them authority to file the petitions. The IRS is unable to demonstrate such circumstance as would warrant the court not granting Petitioners the right to make an amendment to their petitions. *See Construction Equipment Lease Co., supra* at 630.

The IRS has argued previously that IRC

"general partners for the limited purpose of serving as TMP." Petitioners were duly authorized to file the petitions at the time they were filed.

Moreover, there is conclusive evidence that both Adams and the majority of the limited partners ratified Petitioners status as TMPs and the filing of the petitions subsequent to the filing thereof. On February 12, 1990, Adams executed a "Resignation of Tax Matters Partner and Appointment of New Tax Matters Partner." Subsequent to February 12, 1990, limited partners representing percentages ranging from forty percent (40%) to eighty-seven (87%) of the total interests in the partnerships signed documents consenting to Petitioners' appointments. Accordingly, subsequent conduct and written documents by Adams, as well as the limited partners, indicate that Adams and the limited partners

ratified Petitioners' appointment as TMPs and their filing of the petitions herein. Therefore, under the holdings of *Montana Sapphire* and *Mishawaka*, Adams or the partnership must be permitted to file an amended petition. *Cf. Kraasch v. Commissioner*, 70 T.C. 623 (1978)(involving implied ratification in a non-TEFRA case.)

Additionally, in the present cases, as in *Construction Equipment Lease Co.*, the Petitioners had a reasonable belief that either they were the TMPs for the partnerships or that Adams gave them authority to file the petitions. The IRS is unable to demonstrate such circumstance as would warrant the court not granting Petitioners the right to make an amendment to their petitions. *See Construction Equipment Lease Co., supra* at 630.

The IRS has argued previously that IRC

6226(e) makes it impossible for Adams to ratify this petition because Petitioners did not deposit with the court the amount by which Adams tax liability would have increased if the partnership items were removed from his return as adjusted by the FPAA. This argument fails, however, since Adams, because of his settlement agreement, would not owe any additional taxes. Therefore, if Adams were still the TMP at the time the petitions were filed, he should be allowed to ratify those petitions.

Alternatively, it is established as a matter of tax law that "A" may properly pay or make a deposit of taxes owed by "B."[8] Further, it is clear that under

---

[8] *See Stahmann v. Vidal*, 305 U.S. 61 (1938); *Cindy's Inc. v. U.S.*, 740 F.2d 851 (11th Cir. 1984); *Collins v. U.S.*, 532 F.2d 1344 (Cl. Ct. 1976). *See also* Burnett & Kafka, *supra* at §11.07. There is a controversy over who may properly file a refund claim under §§6402 and 6511 when a third party pays the taxes. However, in this instance, this is not a

the TEFRA procedures if a good faith deposit of the taxes is made which deposit proves to be less than the amount due under the FPAA the petition will not be dismissed but rather the court will require the correct deposit to be made. IRC §6226(e)(1). Hence, in this instance, the deposits made in each instance could be designated by the Petitioners as deposits on behalf of Adams and the court could make a determination of whether the deposits were adequate and as appropriate order the amounts increased.

For these reasons, Adams or the partnership should be allowed to ratify the petitions. By so doing, the partnership would be allowed to determine the forum which would best suit its needs.

---

refund suit and is not governed by §§6402 and 6511.

IV. CONCLUSION

For the foregoing reasons,

Petitioners' petition for writ of certiorari should be granted.

Respectfully submitted.

Arthur H. Boelter
Counsel of Record
BOELTER & GALE
1001 Fourth Avenue
Suite 4111
Seattle, WA 98154
(206) 587-0000

MAY 1993

(2)

Supreme Court, U.S.
FILED

No.

MAY 9 1994

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1993

TRANSPAC DRILLING VENTURE, 1983-63 BY CRESTWOOD HOSPITALS, INC., TRANSPAC DRILLING VENTURE, 1983-1 BY CRESTWOOD HOSPITALS, INC., TRANSPAC DRILLING VENTURE,1983-2 BY JAMES M. DOBBINS, AND TRANSPAC DRILLING VENTURE,1983-4 BY BRYAN D. BURR,
PETITIONERS,

v.

UNITED STATES,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Arthur H. Boelter
Counsel of Record
BOELTER & GALE
1001 Fourth Avenue #4111
Seattle, WA 98154-1121
(206) 587-0000

No.

In the Supreme Court of the United States

OCTOBER TERM, 1993

TRANSPAC DRILLING VENTURE, 1983-63 BY CRESTWOOD HOSPITALS, INC., TRANSPAC DRILLING VENTURE, 1983-1 BY CRESTWOOD HOSPITALS, INC., TRANSPAC DRILLING VENTURE,1983-2 BY JAMES M. DOBBINS, AND TRANSPAC DRILLING VENTURE,1983-4 BY BRYAN D. BURR,

PETITIONERS,

v.

UNITED STATES,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Arthur H. Boelter
Counsel of Record
BOELTER & GALE
1001 Fourth Avenue #4111
Seattle, WA 98154-1121
(206) 587-0000

APPENDIX

Lower Courts' Judgments:

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

93-5045

TRANSPAC DRILLING VENTURE, 1983-63 by CRESTWOOD HOSPITALS, INC., TRANSPAC DRILLING VENTURE, 1983-1 by CRESTWOOD HOSPITALS, INC.,TRANSPAC DRILLING VENTURE, 1983-2 by JAMES M. DOBBINS, TRANSPAC DRILLING VENTURE, 1983-4 by BRYAN D. BURR,

Plaintiffs-Appellants,

and

TRANSPAC DRILLING VENTURE, 1983-14, by ALISTER CORPORATION,TRANSPAC DRILLING VENTURE, 1983-38 by LINDSEY & HALL, INC.

Plaintiffs,

v.

UNITED STATES,

Defendant-Appellee.

Arthur H. Boelter, Boelter & Gale, of Seattle, Washington, argued for plaintiffs-appellants. With him on the brief was John J. White, Jr. and Shawn M. Soderberg.

Sarah K Knutson, Attorney, Department of Justice, of Washington, D.C., argued for defendant-appellee. With her on the brief were Michael L. Paup, Acting Assistant Attorney General, Gary R. Allen and Teresa E. McLaughlin, Attorneys.

Appealed from: U.S. Court of Federal Claims Judge Margolis

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

93-5045

TRANSPAC DRILLING VENTURE, 1983-63 by CRESTWOOD HOSPITALS, INC.,TRANSPAC DRILLING VENTURE, 1983-1 by CRESTWOOD HOSPITALS, INC., TRANSPAC DRILLING VENTURE, 1983-2 by JAMES M.DOBBINS,TRANSPAC DRILLING VENTURE, 1983-4 by BRYAN D. BURR,

Plaintiffs-Appellants,

and

TRANSPAC DRILLING VENTURE, 1983-14, by ALISTER CORPORATION,TRANSPAC DRILLING VENTURE, 1983-38 by LINDSEY & HALL, INC.,

Plaintiffs,

v.

UNITED STATES,

Defendant-Appellee.

DECIDED: February 8, 1994

Before NIES, Chief Judge, BENNETT, Senior Circuit Judge, and RADER Circuit Judge.

NIES, Chief Judge.

In the Internal Revenue Code of 1986

(26 U.S.C. et seq.), section 6226(b)(3) permits the "tax matters partner" of a limited partnership to file a petition on behalf of the partnership to contest adjustments to partnership income made by the Internal Revenue Service. The appeal in this case, which comes to us from the United States Court of Federal Claims (Margolis, J.), concerns this provision of the code. The trial court dismissed the subject petitions concerning tax years 1983 and 1984, on the ground that none of the parties filing for the partnerships, Crestwood Hospital, Inc., James M. Dobbins, or Bryan D. Burr, was a "tax matters partner" (TMP) authorized to do so under the statute. We agree and, accordingly, affirm the judgments.

I.

BACKGROUND

Transpac Drilling Venture 1983-63, 1983-1, 1983-2, and 1983-4 (hereinafter TDV 1983-63, TDV 1983-1, TDV 1983-2 and TDV 1983-4) is each a limited partnership organized under the laws of Delaware. Crestwood Hospital, Inc., Bryan Burr, and James M. Dobbins were limited partners in one or more of these partnerships during the tax years 1983 and 1984.

Douglas C. Adams was one of two general partners for each of the limited partnerships during the tax years at issue. Adams was designated the TMP in the partnership agreements for the partnerships, dealt with the IRS as TMP, and held himself out to be TMP of the respective partnerships until January 30, 1990. The other general partner, Churchill Oil & Gas Corporation,

forfeited its corporate charter in September 1984.

During 1986 or 1987, the Government began investigating Adams in connection with possible criminal violations for his activities with respect to the development, promotion and sale of tax shelter investment programs, including the various Transpac Drilling Ventures. On September 4, 1987, Adams entered into a plea agreement with the Offices of the United States Attorneys for the Southern District of New York and the District of New Jersey, pursuant to which Adams agreed, inter alia, to plead guilty to charges of conspiracy and aiding and abetting fraud by an investment counselor and to file amended personal federal income tax returns for the tax years at issue. The IRS was not a party to the plea agreement and remained free to pursue any lawful civil remedies it

deemed appropriate against Adams.

The IRS conducted partnership level examinations of the TDV partnerships' tax returns filed for the taxable years 1983 and 1984 during 1988 and 1989 treating Adams as the TMP. At the conclusion of the examinations, the IRS issued notices of Final Partnership Administrative Adjustments (FPAAs) and mailed them to Adams, as TMP, on November 7 (TDV 1983-63), 9 (TDV 1983-1 and 1983-2), and November 17 (TDV 1983-4), 1989. Copies of the FPAA were also sent to the limited partners, including Crestwood, Burr and Dobbins, who are termed "notice" partners.[1]

---

[1] Section 6231 of Title 26 of the United States Code defines a notice partner as a partner who is entitled to notice under 26 U.S.C. § 6223(a). Section 6223(a) provides that the Secretary must give notice of the beginning and completion of administrative proceedings under TEFRA to partners who have furnished their names and addresses to the Secretary at least 30 days before the notice is mailed to the tax matters partner.

Under the statutory framework, either the "tax matters partner" or any "notice partner" may challenge the FPAA in proceedings brought in the Tax Court, the appropriate United States District Court, or the Court of Federal Claims. Only one such petition for readjustment may go forward. See I.R.C. § 6226(b). If the TMP files a petition for readjustment in the Tax Court, the Court of Federal Claims or the appropriate federal district court, within 90 days of issuance of the statutory notice, any other action is precluded. I.R.C. § 6226 (a), (b) (1). If the 90-day period expires without the filing of such a petition by the TMP, then any notice partner may file a readjustment petition within the next 60 days in any of the

---

Subsection (b) indicates that subsection (a) does not apply to a partner if the partnership has more than 100 partners and the partner has less than a 1 percent interest.

courts in which the TMP could have filed. If more than one notice partner files a readjustment petition, then the first petition filed in the Tax Court (if any) goes forward, and all other petitions are dismissed. I.R.C. § 6226 (b)(2). If no petition is filed in the Tax Court, then the first petition filed in a district court of in the Court of Federal Claims goes forward, and all other petitions are dismissed. I.R.C. §§ 6226 (b)(3), (4).

The statute effectively permits the TMP to select the forum for the litigation by filing a timely petition. The selection of the forum may be considered by a TMP as an important advantage since significant differences exist between the various fora. Additionally, it must be noted that the aforementioned requirements for filing a petition are jurisdictional in nature because a petition filed within 90 days

by a partner who is not a TMP does not effectively commence suit. See Computer Programs Lambda, Ltd. v. Commissioner, 89 T.C. 198, 202 (1987).

I.R.C. § 6231 (a) (7) (A) permits a partnership to designate its TMP "as provided in regulations," so long as the person or entity chosen is a general partner in the partnership. If the partnership should fail to designate a TMP, then "the general partner having the largest profits interest in the partnership at the close of the taxable year involved" becomes the TMP. I.R.C. § 6231 (a)(7)(B). However, by regulation certain general partners are excluded from serving as TMP, e.g., one who is under investigation for criminal tax evasion. The I.R.C. further provides that the Secretary of the Treasury may designate a TMP for a partnership if no general partner has been designated as

such, and it would be "impracticable to apply subparagraph (B)." I.R.C. § 6231 (a)(7).

Adams, who received notice while TMP, filed no petitions. It is accepted for purposes of decision here that he orally resigned as TMP on January 30, 1990, and orally named a limited partner to act as TMP at that time. On February 9, 1990, a petition in the Court of Federal Claims for each partnership was filed by the named limited partner claiming to be the successor TMP.[2] On February 12, 1990, after these petitions for readjustment were filed, Adams executed a document "Resignation of Tax Matters Partner and Appointment of New Tax Matters Partner," for each of the partnerships in question. In each document, Adams stated that he

---

[2] The trial court found each petition was timely filed, i.e., within 90 days of the issuance of the FPAA, despite the November 7, 1989, issue date of one of the FPAAs.

was resigning as TMP, and that he was appointing taxpayers Crestwood, Dobbins and Burr as general partners of the respective partnerships for the tax years 1983 and 1984 "for the limited purpose of serving as TMP." Taxpayers each executed acceptances of their respective appointments on April 9, 1990. In March 1990, appellants also submitted consents by a majority in interest of the limited partners for the filing partner to serve as TMP in two of the partnerships.

The IRS administrative files do not contain any record of the resignation of Adams as any partnership's TMP or the designation of a successor. The first notice the IRS received was by the petitions filed in the Court of Federal Claims in February 1990, which state that on or about January 30, 1990 the original TMP, Adams, "resigned as TMP and agreed to the appointment of [the limited

partner who filed] as TMP and as a general partner for the limited purpose of serving as TMP."[3]

The Government moved to dismiss each of the subject petitions for lack of jurisdiction on the ground that the petitions were filed during the 90-day period reserved exclusively for filing by a TMP and none of the petitioners who filed had that status. The trial court agreed. In addition, the court rejected appellant's various arguments for retroactive ratification of the petitions.

After the 90-day period during which only a TMP may file suit, other limited partners in three of the four partnerships filed timely petitions in

---

[3] The petition filed by Dobbins inconsistently states in one place that Dobbins was appointed as successor TMP and in another that the substituted TMP is Crestwood. We will deem this an editing error.

the U.S. Tax Court. Other protective petitions were filed in the Court of Federal Claims. The dispute is essentially over which forum will adjudicate the matters. If the petitions filed in the Court of Federal Claims within the 90-day period were effective, those suits preempt any in the Tax Court and vice versa.

II.

STANDARD OF REVIEW

Whether the Court of Federal Claims properly granted the government's motion to dismiss for lack of jurisdiction is a question of law subject to de novo review on appeal. Rocovich v. United States, 933 F.2d 991, 993 (Fed. Cir. 1991).

III.

ANALYSIS

A. Tax Equity and Fiscal Responsibility Act

A partnership is required to file an annual information tax return even though it is not a taxable entity for federal income tax purposes. I.R.C. §§ 701, 6031; 26 C.F.R. § 1.701-1. Each partner is liable for income tax in his or her individual capacity with respect to his or her share of partnership items of income, loss, deduction and credit. I.R.C. § 702; 26 C.F.R. § 1.701-1. Prior to 1982, adjustments to the tax treatment of partnership items had to be determined in separate proceedings involving each individual partner, resulting in duplication of administrative and judicial effort, inconsistent results and difficulty in reaching comprehensive

settlements. See Maxwell v. Commissioner, 87 T.C. 783, 787 (1986).

To simplify the procedures for determining the tax liability of individual partners in a partnership, Congress enacted the Tax Treatment of Partnership Items Act of 1982 as Title IV of the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No 97-248, 96 Stat. 324. I.R.C. § 6231 (a)(1). The provisions, set forth in Subchapter C of Chapter 63 of the Internal Revenue Code at §§ 6221-6233, establish procedures for determining tax treatment of partnership items on audit and for obtaining judicial review of those determinations. See Maxwell v. Commissioner, 87 T.C. at 787-88.

Under TEFRA, the IRS is required to give partners notice when it begins an administrative proceeding relating to a partnership item. I.R.C. § 6223(a)(1).

TEFRA applies to all partnerships required to file a return under section 6031(a)(4).[4] If the administrative proceeding results in any adjustments to partnership items, the IRS is required to mail a notice of a FPAA reflecting its determinations to the TMP for the partnership in question. I.R.C. § 6223(a),(d). Section 6231(a)(7) defines a TMP as follows:

> (7) Tax matters partner. The tax matters partner of any partnership is--
>
> (A) the general partner designated as the tax matters partner as provided in regulations, or
>
> (B) if there is no general

---

[4] Section 6031 provides: "Every partnership (as defined in section 761(a)) shall make a return for each taxable year . . . ." 26 U.S.C. § 6031(a). Section 761(a) defines partnership as "a syndicate, group, pool, joint venture, or other unincorporated organization through or by means of which any business, financial operation, or venture is carried on, and which is not, within the meaning of this title, a corporation or a trust or estate." 26 U.S.C. § 761(a).

> partner who has been so designated, the general partner having the largest profits interest in the partnership in the taxable year involved (or, where there is more than 1 such partner, the 1 of such partners whose name would appear first in an alphabetical listing).
>
> If there is no general partner designated under subparagraph (A) and the Secretary determines that it is impracticable to apply subparagraph (B), the partner selected by the Secretary shall be treated as the tax matters partner.

B. Petitions as Filed Were Defective

The appellants here were not TMPs of the partnerships at the time of filing or at any time within the 90-day period reserved for filing by a TMP. First, each was ineligible to be designated as TMPs under subsections (A) or (B) of § 6231(a)(7) because none was a general partner of the partnership on whose behalf the petition was filed. As the

Court of Federal Claims noted, general partners assume unlimited liability for partnership debts under Delaware limited partnership law.[5] Dobbins, Burr, and Crestwood did not. They, at most, agreed to be general partners for the limited purpose only of serving as the TMP. Not having taken on general liability, they do not qualify as general partners and cannot be designated by the partners as TMPs under either paragraph A or B of the statute or under the Temporary Regulations implementing that provision. Temp. Treas. Reg. § 301.6231(a)(7)-IT(b)(1)(1987). To hold that the requirement of the statute that the TMP must be a general partner could be so easily circumvented would effectively

---

[5] General partners of limited partnerships have "the liabilities of a partner in a partnership without limited partners to persons other than the partnership and the other partners." Del. Code Ann. tit. 6, § 17-403 (1974 & Supp. 1988).

vitiate the statutory requirement.

Appellants argue, however, that there are circumstances where a limited partner may become a TMP. The IRS expressly has stated that it has the authority to appoint a limited partner as a TMP. Rev. Proc. 88-16, 1988-1 C.B. 691. Here, however, the IRS did not appoint the petitioners as TMPs. Indeed, the Secretary had not selected anyone to be "treated as the tax matters partner" as authorized in section 6231(a)(7) and was not even aware that Adams had resigned until after the subject petitions were filed.

Appellants next argue that section 6231(a)(7) and the Temporary Regulations do not control once the FPAA has been issued to a partnership. According to appellants, the TEFRA proceedings have two distinct stages: an administrative stage and a judicial stage, and the

rights and responsibilities of the TMP differ in the two stages. Per appellants, the purpose of section 6231(a)(7) is only to set forth the criteria for the selection of a TMP when the partnership is before the Service. The TMP serves as a liaison between the Service and the partnership. If restricted to section 6231(a)(7), appellants argue, it could be impossible for some partnership to appoint a TMP and the Service has no incentive to do so. Thus, after issuance of the FPAA, appellants urge that the partnership should be able to designate a TMP of its own choosing from among any of the limited partners. We disagree.

Nothing in the statute restricts section 6231(a)(7) to pre-litigation. The TMP of a partnership is a continuing status until changed in accordance with the statute and regulations. Here

nothing in the statute or regulations permitted the general partner, Adams, to appoint a new TMP of a partnership. Further, we have been pointed to no evidence in the record that Adams had authority to select or even propose a TMP candidate under the partnership agreement.

Finally, appellants argue that the statute requires the partnership to have a TMP for judicial proceedings. We disagree. The statute clearly contemplates suits by non-TMPs. While the TMP may act to preempt the rights of others to sue, the absence of a TMP is no different from the failure of a TMP to take timely action or to take no action at all.

For the foregoing reasons, we conclude that the petitions were not filed by an entity who was a TMP at the time.

C. Post-Filing Validation

Appellants urge that steps have been taken and others could be taken to validate the petitions as of their filing date.

Appellants first suggest that the court should sua sponte appoint the filing partners as TMPs. They point out that a large percentage of partners voted, after the petitions were filed, in favor appellants as their TMP.

Jurisdiction over a TMP complaint must have been acquired as of the date when the petition was filed or at least before expiration of the 90 day period in which a TMP may file and preempt other suits. No alleged validating action was taken within that time. We question whether retroactive validation of a wholly defective complaint for the purpose of giving a court jurisdiction is ever appropriate. In this case, clearly it is

not. Such action would be contrary to the statutory scheme in issue. Under the statute, the untimeliness or failure of actions by a TMP gives rise to entitlements in other partners to file suit. Moreover, such rights have been exercised in this case. Thus, retroactive validation would void the rights of others, not merely preserve rights.

Appellants place great reliance on rulings of the Tax Court respecting post-filing appointments of TMPs or later ratifications by partners. However, we do not find that the cited Tax Court cases provide appropriate guidance here.

In Computer Programs Lambda, Ltd. v. Comm'r, 90 T.C. 1124 (1988), the Tax Court held that it had inherent power to appoint a limited partner to serve as a TMP, even though such authority is not granted under section 6231(a)(7), since

the partnership had no eligible general partner and the IRS had not selected a TMP under section 6231(a)(7). Id. at 1127.

The facts are not entirely clear from the opinion in Computer Programs respecting how many petitions had been filed. The court mentions its previous opinion in the case in which it found all general partners were ineligible to serve as TMP; the "proper" petition by a notice partner filed on August 11, 1986; and other parties to the litigation under Section 6226(c) whose interests the court wished to protect. Id. at 1125. To facilitate the litigation, the Tax Court appointed a TMP solely for that purpose. The court's validation of the petition at the time of filing by appointment of a TMP was not an issue. Indeed, the court specifically made the date of appointment effective as of February 2, 1988, id. at

1128, clearly not the filing date of the litigation. Thus, this opinion lends no support for appointment of a court-designated TMP, retroactive to the filing date, in order to validate a purported TMP preemptive complaint. The TMP was appointed merely to carry on the litigation , not to instigate it. We agree with the Court of Federal Claims that the court does not have inherent power to appoint anyone as TMP where the cases are not properly before the court because the petitions were not properly filed.

Another case cited as authority for ratification, after the filing of a defective petition, Mishawaka Properties Co. v. Comm'r, 120 T.C. No. 22 (1993), is particularly inapt. In an attempt to avoid a tax assessment,[6] the Mishawaka

---

[6] The Mishawaka partners believed the period for assessment had expired unless delayed by a properly filed

partners sought to escape the Tax Court's jurisdiction over a petition filed by the managing partner, whom the IRS dealt with as TMP but who was not the TMP if the partnership were a general rather than a limited partnership. However, the filing partner was held to be the agent of all partners, including the partner who qualified as the TMP (if a general partnership) under Section 6231(a)(7)(B). The Tax Court held that the course of conduct of all partners before and after the filing indicated their approval of the petition at the time it was filed and, thus, the petition filed on their behalf, was held to invoke the court's jurisdiction. Unlike the partners here, the Mishawaka partners unsuccessfully sought to disavow the petition, not retroactively validate it.

Chomp. Assoc. v. Comm'r, 91 T.C. 1069

---

petition.

(1988), also cited by appellants, rests on an unremarkable finding of fact that the petition in issue was filed by the TMP partner. Montana Sapphire Associates Ltd. v. Comm'r, 95 T.C. 477 (1970), holds only that the court has discretion to grant leave to amend a technically defective petition where there is evidence that the original signatory was duly authorized to file a petition on behalf of the TMP. Neither supports petitioners here. The record establishes unequivocally that petitioners here were principals signing as the purportedly new TMPs. They did not act or even purport to act of behalf of or as agent or attorney for Adams as TMP.[7] We find no support for appellants' position that one

---

[7] We need not analyze the additional jurisdictional requirement that the partner filing a petition in the Court of Federal Claims must pay the amount of the tax deficiency. We do not have enough information respecting Adams' tax liability, if any.

entity may be substituted for another who filed the petition in order to create jurisdiction retroactively. Jurisdiction is never a matter of discretion. As we read its precedent, the Tax Court has held merely that it may, as a matter of discretion, permit amendment of a technically defective TMP petition to allow substitution of the correct party where a petition was signed by essentially an "alter ego" or agent of the TMP.

D. Appellants Have Not Been Denied Due Process

Appellants argue that if section 6231(a)(7) and the Temporary Regulations are applicable during the judicial phase of the TEFRA proceedings, the partners' constitutional rights are impaired, since the IRS, the partnership's adversary, either is allowed to designate its opponent's representative, or is allowed

to leave its opponent without a representative.

The IRS asserts that appellants' due process arguments are meritless since notice partners are permitted to file petitions after the 90 day period and did so in this case. The IRS further points out that a properly appointed TMP may intervene in any such action under section 6226(b)(5). Therefore, appellants and other limited partners will have a full opportunity to litigate the readjustment issue and have not been denied due process.

The due process arguments of appellants highlight the fact that this dispute is about choice of forum. Although appellants prefer to litigate their dispute in a forum other than the Tax Court, appellants have not been denied due process merely because, under the circumstances here, they must proceed

in that forum.

IV.

CONCLUSION

Having duly considered the above and all other of appellants' arguments, we affirm the judgment of the Court of Federal Claims dismissing the petitions for lack of jurisdiction.

AFFIRMED

IN THE UNITED STATES CLAIMS COURT

90-116T, 90-123T, 90-124T, 90-130T, 90 -146T, & 90-153T
(Filed September 25, 1992)

TRANSPAC DRILLING VENTURE, 1983-63, BY CRESTWOOD HOSPITALS, INC.,

Plaintiff,

v. 90-116T

UNITED STATES,

Defendant.

Taxes; jurisdiction; partnership tax; final partnership administrative adjustment; petition for readjustment; tax matters partner.

TRANSPAC DRILLING VENTURE, 1983-1, BY CRESTWOOD HOSPITALS, INC.,

Plaintiff,

v. 90-123T

UNITED STATES,

Defendant.

TRANSPAC DRILLING VENTURE, 1983-2, BY JAMES M. DOBBINS,

Plaintiff,

v. 90-124T

UNITED STATES,

Defendant.

TRANSPAC DRILLING VENTURE,
1983-4, BY BRYAN D. BURR,

Plaintiff,

v. 90-130T

UNITED STATES,

Defendant.

TRANSPAC DRILLING VENTURE,
1983-14, BY ALISTAR CORPORATION,

Plaintiff,

v. 90-146T

UNITED STATES,

Defendant.

TRANSPAC DRILLING VENTURE,
1983-38,BY LINDSEY & HALL, INC.,

Plaintiff,

v. 90-153T

UNITED STATES,

Defendant.

Arthur H. Boelter, Seattle, Washington, for plaintiffs.

William K. Drew, Washington, D.C.,

with whom was *Acting Assistant Attorney General Brian C. Griffin*, for defendant.

OPINION

MARGOLIS, *Judge*.

These tax cases are before the court on defendant's motions to dismiss. Plaintiffs-partnerships filed petitions for readjustment in this court following receipt from the Internal Revenue Service (IRS) of notices of final partnership administrative adjustments (FPAA). Defendant now moves to dismiss, contending that this court lacks subject matter jurisdiction over all the cases.

FACTS

The IRS conducted partnership level examinations of the 1983 and 1984 tax returns of the plaintiffs-partnerships: Transpac Drilling Venture (TDV) 1983-63, TDV 1983-1, TDV 1983-2, TDV 1983-4, TDV

1983-14, and TDV 1983-38. All the plaintiffs-partnerships are limited partnerships organized under the laws of Delaware. Following completion of the examinations, the IRS mailed FPAAs to each partnership's tax matters partner (TMP) of record at that time.[8]

According to TDV 1983-2, TDV 1983-4, TDV 1983-1, and TDV 1983-63, Adams orally resigned as TMP of the partnerships on January 30, 1990, leaving the partnerships without any remaining general partners eligible to assume the position of TMP. TDV 1983-38 asserts that Cofman resigned as its TMP on February 13, 1990, also leaving it without a general partner eligible to be TMP. TDV 1983-14 maintains that its sole

---

[8] At the time the IRS mailed the FPAAs, Douglas C. Adams (Adams) was the TMP of record for TDV 1983-63, TDV 1983-1, TDV 1983-2, TDV 1983-4, and TDV 1983-14. Morris Cofman (Cofman) was the TMP for 1983-38.

limited partner at the time, Alistar Corporation (Alistar), removed Adams as its TMP in June 1989, leaving it without a general partner eligible to be TMP.

TDV 1983-2, TDV 1983-4, TDV 1983-1, and TDV 1983-63 further assert that James M. Dobbins (Dobbins), Bryan D. Burr (Burr), and Crestwood Hospitals, Inc. (Crestwood), limited partners of the respective partnerships,[9] were designated general partners for the purpose of serving as TMPs. TDV 1983-38 asserts the same as to Linsdey & Hall, Inc. (Lindsey & Hall). TDV 1983-14 contends only that one Adams was removed as TMP, Alistar, continuing in its capacity as a limited partner, became TDV 1983-14's new TMP.

On February 12, 1990, Adams signed documents entitled "Resignation of Tax Matters Partner and Appointment of New

---

[9] Crestwood is a limited partner of both TDV 1983-1 and TDV 1983-63.

Tax Matters Partner," in which, according to plaintiffs-partnerships, Adams memorialized his oral resignation as TMP of TDV 1983-2, TDV 1983-4, TDV 1983-1, and TDV 1983-63 and appointed Dobbins, Burr, and Crestwood as TMPs for the tax years 1983 and 1984. Although not signed by Dobbins, Burr, and Crestwood, the documents also provided that each "accepts his appointment" and "agrees to become a general partner for this limited purpose only." Cofman apparently executed a similar document for TDV 1983-38 on February 14, 1990.

All of the purported TMPs deposited funds with the IRS equalling their estimates of the increase in taxes if the adjustments made in the FPAAs were upheld. All plaintiffs-partnerships then filed timely petitions for readjustment in this court.

DISCUSSION

In its motions to dismiss, defendant contends that this court is without subject matter jurisdiction because Dobbins, Burr, Crestwood, Lindsey & Hall, and Alistar were not the proper parties to file petitions for readjustment during the period of time in which they did. According to the Internal Revenue Code of 1986, 26 U.S.C. § 6226(a) (hereinafter I.R.C.), once an FPAA is mailed to the TMP, the TMP has 90 days within which to file a petition contesting the adjustments. This code section allows only for filing by the TMP during this time period, but I.R.C. § 6226(b) permits others to file a petition within 60 days following the expiration of the original 90 day period if the TMP failed to file a readjustment petition within that time.

I.R.C. § 6231(a)(7)(A) permits a partnership to designate its TMP "as

provided in regulations,"[10] so long as the person or entity chosen is a general partner in the partnership. If the partnership should fail to designate a TMP, then "the general partner having the largest profits interest in the partnership at the close of the taxable year involved" becomes the TMP. I.R.C. § 6231(a)(7)(B). However, the I.R.C. further provides that the Secretary of the Treasury may designate a TMP for a partnership if no general partner has been designated as such, and it would be "impracticable to apply subparagraph (B)." I.R.C. § 6231(a)(7).

As defendant notes, the aforementioned requirements for filing a petition are jurisdictional in nature because the

---

[10] Temp. Treas. Reg. § 301.6231(a)(7)-1T(b) provides that a person may be a TMP if that person was a general partner in the partnership at some time during the taxable year or at the time the designation as TMP was made.

failure to comply with them means that the petition for readjustment does not effectively commence suit. *See Computer Programs Lambda, Ltd. v. Comm'r*, 89 T.C. 198, 202 (1987). Because Dobbins, Burr, Crestwood, Lindsey & Hall, and Alistar filed the petitions for readjustment within 90 days of the mailing of the FPAAs, this court must determine if they satisfied the TMP requirements.

I. General partner status

Defendant argues that Dobbins, Burr, Crestwood and Lindsey & Hall were not TMPs at the time of the filing of the petitions because they were not general partners of their partnerships. Plaintiffs respond, stating that the appointment of Dobbins, Burr, Crestwood, and Lindsey & Hall as general partners properly complied with the law governing the partnerships, Delaware law, as well

as with the partnership agreements.

To determine if the aforementioned purported TMPs were in fact general partners for purposes of I.R.C. § 6231(a)(7)(A), this court must turn to the law under which the partnerships were created, Delaware limited partnership law. Del. Code Ann. tit. 6, § 17-403(1974 & Supp. 1988), provides that general partners of limited partnerships have "the liabilities of a partner in a partnership without limited partners to persons other than the partnership and the other partners." In other words, general partners assume unlimited liability for partnership debts. *See Mercier v. Saber, Inc.*, 708 F. Supp. 27, 29 (D.R.I.)(construing the Revised Uniform Limited Partnership Act, which Delaware follows), *aff'd* 888 F.2d 1459 (1st Cir. 1989); *Klein v. Weiss*, 395 A.2d 126, 135 (Md. 1978)(same). In referring

to the resignation and designation documents executed by Adams and Cofman, defendant maintains that Dobbins, Burr, Crestwood, and Lindsey & Hall have not assumed such liability because the documents in question state that the aforementioned partners because general partners for the "limited purpose only" of being TMPs. Defendant concludes that Dobbins, Burr, Crestwood, and Lindsey & Hall remain limited partners only and therefore cannot be TMPs.

Plaintiffs-partnerships do not dispute that Dobbins, Burr, Crestwood, and Lindsey & Hall have not assumed unlimited liability, but assert that "the unlimited liability of a general partner has nothing to do with the reason why the regulation calls for the TMP to be a general partner . . . ." In citing *Chomp Assoc. v. Comm'r*, 91 T.C. 1069 (1988), plaintiffs conclude that a TMP need not

fully comply with the statutory requirements of general partner status because I.R.C. § 6231 was enacted only to provide the IRS with a contact at a partnership possessing authority to act for the partnership on tax matter; according to plaintiffs, Congress did not intend the statute to ensure that the TMP would have third party liability.

Notwithstanding plaintiffs-partnerships' unsupported conclusions about the intent behind the pertinent I.R.C. provisions, this court finds that because Dobbins, Burr, Crestwood, and Lindsey & Hall have not assumed unlimited liability they cannot be considered general partners, and consequently do not meet the definition of a TMP in I.R.C. § 6231 (a)(7)(A).[11] To find otherwise

---

[11] Defendant also argues in this regard that Dobbins, Burr, Crestwood, and Lindsey & Hall were not properly admitted to the partnerships in question as general partners because they did not obtain the

would simply to ignore the language of the statute and the plain legal meaning associated with that language. Because Dobbins, Burr, Crestwood, and Lindsey & Hall were not TMPs at the time they filed the petitions for readjustment (which was within the initial 90 day period after the mailing of the FPAAs), I.R.C. § 6226(a) has not been satisfied, and the petitions did not effectively commence suit. *See Computer Programs Lambda, Ltd.*, 89 T.C. at 202.[12]

Regarding TDV 1983-14, Alistar does

---

written consents of all the partners and did not file an amendment to the certificates of limited partnership. This court takes no position on this matter because of the ruling, *supra*, that, without assuming unlimited liability, the aforementioned partners could not properly be considered general partners.

[12] In its motion to dismiss, defendant raises several other alleged defects with plaintiffs-partners' petitions that could result in depriving this court of subject matter jurisdiction. However, because of the ruling, *supra*, this court need not reach those issues.

not maintain that it was a general partner either at any time during 1983 or 1984 or at the time the purported designation as TMP was made. Alistar instead argues that Temp. Treas. Reg. § 301.6231(a)-1T(f)(1)[13] authorizes a partnership to appoint a limited partner to serve as TMP and that Alistar was appointed under that regulation. As

---

[13] This section reads as follows:

> (1) In general. A tax matters partner may be designated for a partnership taxable year under this paragraph (f) only if, at the time the designation is made, each partner who was a general partner at the close of such partnership taxable year is described in one or more of the following subdivisions of this paragraph (f)(1).
>
> (i) The general partner is dead, or, if the general partner is an entity, has been liquidated or dissolved;
>
> (ii) The general partner has been adjudicated by a court of competent jurisdiction to be no longer capable of managing his or her person or estate;
>
> (iii) The general partner's partnership items have become nonpartnership items under section 6231(b); or
>
> (iv) The general partner is no longer a partner in the partnership.

defendant notes, paragraph (f) must be read in conjunction with paragraph (b), which provides that to be eligible to be a TMP, a person must have been a general partner in the partnership at some time during the tax year in question or must have been a general partner at the time the TMP designation was made. When paragraph (f) is read in light of paragraph (b), this court cannot find that paragraph (b) permits a partnership to name a limited partner as TMP. Paragraph (f) pertains to situations in which no general partners from a tax year in question exist or are eligible to serve as TMP for that tax year. In such circumstances, paragraph (f) allows certain partners to designate a TMP; nevertheless, the designation still must conform with paragraph (b), which in this circumstance means that a person who is a general partner at the time of TMP

designation may properly be designated as such. Because Alistar was at all times a limited partner, paragraph (f) cannot work in its favor.

II. Recognition of Alistar as TMP

Alistar asserts that defendant has recognized it as TDV 1983-14's TMP because defendant addressed an April 6, 1990 FPAA to it in its capacity as TMP. Defendant counters that this FPAA was "merely sent to Alistar as a precautionary measure and did not constitute a designation or recognition of Alistar as the TMP of TDV 1983-14." Defendant explains that the FPAA giving rise to Alistar's February 13, 1990 petition for readjustment was mailed to Adams as TDV 1983-14's TMP on November 17, 1989, with copies sent to Alistar as notice partner on December 5, 1989. As defendant notes, the April 1990 FPAA is

not probative of whether Alistar had been validly appointed as TDV 1983-14's TMP as of February 13, 1990, the date Alistar filed its petition for readjustment in this case. Whether or not defendant recognized Alistar as TMP at some point after Alistar had filed its petition for readjustment, nothing indicates that Alistar was TDV 1983-14's TMP at the time it filed the petition. Consequently, this court lacks jurisdiction over the case because the petition was not filed by the TMP.

III. Inherent power of the court to designate a TMP

All the plaintiffs-partnerships in these cases also argue that this court may use its inherent power to designate Dobbins, Burr, Crestwood, Lindsey & Hall, and Alistar as TMPs. In *Computer Programs Lambda, Ltd. v. Comm'r*, 90 T.C. 1124 (1988), the Tax Court used its

inherent power to appoint a limited partner as TMP in a case that was properly before it because a notice partner had filed a petition in compliance with § 6226(b)(1). Without a TMP, the court ruled, the interests of partners could have been adversely affected in the course of the litigation because there was no assurance that the partners would receive sufficient information concerning the litigation to protect their interests. *Id.* at 1126-27.

Here, the cases are not properly before the court because the petitions were not properly filed. Consequently, this court has no inherent power to appoint anyone as TMP, and no interests will be adversely affected through the course of litigation because this court has no jurisdiction to entertain these cases.

IV. Ratification of the defective petitions

Because of the ruling regarding Dobbins, Burr, Crestwood, Lindsey & Hall, and Alistar, plaintiffs-partnerships would like this court to allow Adams and Cofman to ratify the petitions if they are still eligible to be TMPs. Both USCCR 17(a) and the Tax Court decision in *Montana Sapphire Assoc. v. Comm'r*, 95 T.C. 477 (1990) appear at first glance to support plaintiffs-partnerships' position. However, as defendant points out, I.R.C. § 6226(e)(1) works against plaintiffs-partnerships.

In cases before the Claims Court or district court, § 6226 (e)(1) requires that the partner filing the readjustment petition deposit with the Secretary of the Treasury the increase in the partner's liability which would occur if the partner's return were made consistent

with the FPAA. Such a deposit must be made prior to or on the day of filing the petition. *Id.* The I.R.C. does not impose a deposit requirement on partners filing petitions in Tax Court. Again, applying the plain meaning of the statute, this court finds that ratification is not permissible here because Adams and Cofman cannot satisfy the statutory demand that they make deposits by the time of filing since the petitions have already been filed.

Because a petition filed in Tax Court does not encounter a deposit jurisdictional requirement such as it would in the Claims Court or the district court, Tax Court opinions do not support plaintiffs-partnerships' ratification argument in this court.

CONCLUSION

For the foregoing reasons, defendant's

motions to dismiss are granted. The clerk will dismiss the petitions. No costs.

s/ Lawrence S. Margolis

LAWRENCE S. MARGOLIS

Judge, U.S. Claims Court

September 25, 1992

Statutes and Regulations:

Tax Equity and Fiscal Responsibility Act of 1982:

26 U.S.C. § 6221:

> Except as otherwise provided in this subchapter, the tax treatment of any partnership item shall be determined at the partnership level.
>
> . . . .

26 U.S.C. § 6224:

> (a) PARTICIPATION IN ADMINISTRATIVE PROCEEDINGS.--Any partner has the right to participate in any administrative proceeding relating to the determination of partnership items at the partnership level.
>
> . . . .
>
> (c) SETTLEMENT AGREEMENT.--In the absence of a showing of fraud, malfeasance, or misrepresentation

of fact--

(1) BINDS ALL PARTIES.--A settlement agreement between the Secretary and 1 or more partners in a partnership with respect to the determination of partnership items for any partnership taxable year shall (except as otherwise provided in such agreement) be binding on all parties to such agreement with respect to the determination of partnership items for such partnership year. An indirect partner is bound by any such agreement entered into by the pass-thru partner unless the indirect partner has been identified as provided in section 6223(c)(3).

(2) OTHER PARTNERS HAVE RIGHT TO ENTER INTO CONSISTENT

AGREEMENTS.--If the Secretary enters into a settlement agreement with any partner with respect to partnership items for any partnership taxable year, the Secretary shall offer to any other partner who so requests settlement terms for the partnership taxable year which are consistent with those contained in such settlement agreement. Except in the case of an election under paragraph (2) or (3) of section 6223(e) to have a settlement agreement described in this paragraph apply, this paragraph shall apply with respect to a settlement agreement entered into with a partner before notice of a final partnership administrative adjustment is

mailed to the tax matters partner only if such other partner makes the request before the expiration of 150 days after the day on which such notice is mailed to the tax matters partner.

(3) TAX MATTERS PARTNER MAY BIND CERTAIN OTHER PARTNERS.--

(A) IN GENERAL.--A partner who is not a notice partner (and not a member of a notice groups described in subsection (B)(2) of section 6223) shall be bound by any settlement agreement--

(i) which is entered into by the tax matters partner, and

(ii) in which the tax matters partners expressly states that such agreement shall

bind their other partners.

(B) EXCEPTION.--Subparagraph (A) shall not apply to any partner who (within the time prescribed by the Secretary) files a statement with the Secretary providing that the tax matters partner shall not have the authority to enter into a settlement agreement on behalf of such partner.

. . . .

26 U.S.C. § 6226:

(a) PETITION BY TAX MATTERS PARTNER- Within 90 days after the day on which a notice of final partnership administrative adjustment is mailed to the tax matters partner, the tax matters partner may file a petition for a readjustment of the partnership items for such taxable

year with--

(1) the Tax Court,

(2) the district court of the United States for the district in which the partnership's principal place of business is located, or

(3) the Claims Court.

(b) PETITION BY PARTNERS OTHER THAN TAX MATTERS PARTNER.--

(1) IN GENERAL--If the tax matters partner does not file a readjustment petition under subsection (a) with respect to any final partnership administrative adjustment, any notice partner (and any 5-percent group) may, within 60 days after the close of the 90-day period set forth in subsection (a), may file a petition for a readjustment of the partnership items for the

taxable year involved with any of the courts described in subsection (a).

(2) PRIORITY OF THE TAX COURT ACTION.--If more than 1 action is brought under paragraph (1) with respect to any partnership taxable year, the first such action brought in the Tax Court shall go forward.

(3) PRIORITY OUTSIDE THE TAX COURT. --If more than 1 action is brought under paragraph (1) with respect to any partnership for any taxable year but no such action is brought in the Tax Court, the first such action brought shall go forward.

(4) DISMISSAL OF OTHER ACTIONS.--If an action is brought under paragraph (1) in addition to the action which goes forward under

paragraph (2) or (3), such action shall be dismissed.

(5) TAX MATTERS PARTNER MAY INTERVENE.--The tax matters partner may intervene in any action brought under this subsection.

. . . .

(e) JURISDICTIONAL REQUIREMENT FOR BRINGING ACTION IN DISTRICT COURT OR CLAIMS COURT.--

(1) IN GENERAL.--A readjustment petition under this section may be filed in a district court of the United States or the Claims Court only if the partner filing the petition deposits with the Secretary, on or before the day the petition is filed, the amount by which the tax liability of the partner would be increased if the treatment of partnership items on

the partner's return were mad consistent with the treatment of the partnership items on the partnership return, as adjusted by the final partnership administrative adjustment. In the case of a petition filed by a 5-percent group, the requirement of the preceding sentence shall apply to each member of the group. The court may by order provide that the jurisdictional requirement of this paragraph are satisfied where there has been a good faith attempt to satisfy such requirements and any shortfall in the amount required to be deposited is timely corrected.

(2)REFUND ON REQUEST.--If any action brought in a district court of the United states or in the Claims Court is dismissed by reason of the priority of a Tax Court

action under paragraph (2) of subsection (b), the Secretary shall, at the request of the partner who made the deposit, refund the amount deposited under paragraph (1).

(3) INTEREST PAYABLE.--Any amount deposited under paragraph (1), while deposited, shall not be treated as a payment of tax for purposes of this title (other than chapter 67).

. . . .

26 U.S.C. § 6231

(a) Definition.--For purposes of this subchapter--

(1) Partnership.--

(A) In general.--Except as provided in subparagraph (b), the term "partnership" means any partnership

required to file a return under section 6031(a).

(B) Exception for small partnerships.--

(i) In general.--The term "partnership" shall not include any partnership if--

(I) such a partnership has 10 or fewer partners each of whom is a natural person (other than a nonresident alien) or an estate, and

(II) each partner's share of each partnership item is the same as his share of every other item.

For purposes of the preceding sentence, a husband and wife (and their estates) shall be

treated as 1 partner.

(ii) Election to have subchapter apply.--A partnership (within the meaning of subparagraph (A) may for any taxable year elect to have clause (i) not apply. Such election shall apply for such taxable year and all subsequent taxable years unless revoked with the consent of the Secretary.

. . . .

(3) **Partnership item.**--The term "partnership item" means, with respect to a partnership, any item required to be taken into account for the partnership's taxable year under any provision of subtitle A to the extent regulations prescribed by the

Secretary provide that, for purposes of this subtitle, such item is more appropriately determined at the partnership level than at the partner level.

(4) **Nonpartnership item.**--The term "nonpartnership item" means an item which is (or is treated as) not a partnership item.

. . . .

(7) **Tax matters partner.**--The tax matters partner of any partnership is--

(A) the general partner designated as the tax matters partner as provided in regulations, or

(B) if there is no general partner who has been so designated, the general partner having the largest profits interest in the

partnership at the close of the taxable year involved (or, where there is more than 1 such partner, the 1 of such partners whose name would appear first in an alphabetical listing).

If there is no general partner designated under subparagraph (A) and the Secretary determines that it is impractical to apply subparagraph (B), the partner selected by the Secretary shall be treated as the tax matters partner.

. . . .

(c) Regulations With Respect to Certain Special Enforcement Areas.--

(1) Applicability of subsection.-

-This subsection applies in the case of

(A) assessments under section

6851 (relating to termination assessments of income tax) or section 6861 (relating to jeopardy assessments of income, estate, gift, and certain excise taxes),

(B) criminal investigations,

(C) indirect methods of proof of income,

(D) foreign partnerships, and

(E) other areas that the Secretary determines by regulation to present special enforcement considerations.

(2) **Items may be treated as nonpartnership items.**--To the extent that the Secretary determines and provides by regulations that to treat items as partnership items will interfere with the effective and efficient enforcement of this

title in any case described in paragraph (1), such items shall be treated as nonpartnership items for purposes of this subchapter.

(3) **Special rules.**--The Secretary may prescribe by regulation such special rules as the Secretary determines to be necessary to achieve the purposes of this subchapter in any case described in paragraph (1).

. . . .

Temp. Reg. §301.6224(a)-1T:

Every partner in the partnership, including an indirect partner, has the right to participate in any phase of administrative proceedings. However, except as provided in section 6223 and the regulations thereunder, neither the

Service nor the tax matters partner is required to provide notice of any proceeding to partners. Consequently, a partner who wishes, for example, to be present during a preliminary discussion between an examining agent and the tax matters partner should make special arrangements with the tax matters partner to obtain information as to the time and place of the discussion. The Service and the tax matters partner will determine the time and place for all administrative proceedings. Arrangements will generally not be changed merely for the convenience of another partner.

Temp. Reg. §301.6231(a)(7)-1T:

(a) In general. A partnership may designate a partner as its tax

matters partner for a specific taxable year only as provided in this section. Similarly, the designation of a partner as the tax matters partner for a specific taxable year may be terminated only as provided in this section.

(b) Persons who may be designated tax matters partner--

(1) General requirement. A person may be designated as the tax matters partner of a partnership for a taxable year only if that person

(i) Was a general partner in the partnership at some time during the taxable year for which the designation is made, or

(ii) Is a general partner in the partnership as of the time the designation is made.

. . . .

(f) Designation by partners with majority interest under certain circumstances--

(1) In general. A tax matters partner may be designated for a partnership taxable year under this paragraph (f) only if, at the time the designation is made, each partner who was a general partner at the close of such partnership taxable year is described in one or more of the following subdivisions of this paragraph (f)(1).

(i) The general partner is dead, or, if the general partner is a entity, has been liquidated, or dissolved;

(ii) The general partner has been adjudicated by a court of competent jurisdiction to be

no longer capable of managing his or her person or estate;

(iii) The general partner's partnership items have become nonpartnership items under section 6231(b); or

(iv) The general partner is no longer a partner in the partnership.

. . . .

(k) When designation, etc., becomes effective--

(1) In general. Except as otherwise provided in paragraph (k)(2) of this section, a designation, resignation, or revocation provided for in this section becomes effective on the day that the statement required by the applicable paragraph of this section is filed.

(2) Notice of proceeding mailed. If

a notice of beginning of an administrative proceeding with respect to a partnership taxable year is mailed before the date on which a statement of designation, resignation, or revocation provided for in this section with respect to that taxable year is filed, the Service is not required to give effect to such designation, resignation, or revocation until 30 days after the statement is filed.

(1) **Termination of designation.** A designation of a tax matters partner for a taxable year under this section shall remain in effect until--

(1) The death of the designated tax matters partner,

(2) An adjudication by a court of

competent jurisdiction that the individual designated as the tax matters partner is no longer capable of managing the individual's person or estate,

(3) The liquidation or dissolution of the tax matters partner, if the tax matters partner is an entity,

(4) The partnership items of the tax matters partner become nonpartnership items under section 6231(c)(relating to special enforcement areas), or

(5) The day on which--

(i) The resignation of the tax matters partner under paragraph (i) of this section,

(ii) A subsequent designation under paragraph (d),(e), or (f) of this section, or

(iii) A revocation of the designation under paragraph (j) of this section becomes effective.

The termination of the designation of a partner as the tax matters partner under this paragraph (1) does not affect the validity of any action taken by that partner as tax matters partner before the designation is terminated. For example, if that tax matters partner had previously consented to an extension of the period for assessments under section 6229(b)(1)(B), that the extension remains valid even after termination of the designation.

(m) Tax matters partner where no partnership designation made--

(1) In general. The tax matters partner for a partnership taxable

year shall be determined under this paragraph (m) if:

(i) The partnership has not designated a tax matters partner under this section for that taxable year; or

(ii) The partnership has designated a tax matters partner under this section for that taxable year, that designation has been terminated under paragraph (l) of this section, and the partnership has no made a subsequent designation under this section for that taxable year.

(2) **General partner having the largest profits interest is the tax matters partner.** The tax matters partner for any partnership taxable year to

which this paragraph (m) applies is the general partner having the largest profits interest in the partnership at the close of that taxable year (or where there is more than one such partner, the one of such partners whose name would appear first in an alphabetical listing).

For purposes of this paragraph (m)(2), all limited partnership interests held by a general partner shall be included in determining that general partner's profits interest in the partnership.

. . . .